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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

The decision of the U.S. Court of Appeals has not yet been officially reported, and is attached hereto. App. 1-16.

JURISDICTION

The final decision of the U.S. Court of Appeals was rendered on August 12, 1977. A petition for writ of certiorari is due on or before November 10, 1977. This Court has jurisdiction under 28 U.S.C. § 1257(3).

The decision of the U.S. Court of Appeals invalidates various California water laws, as applied to the U.S. Bureau of Reclamation, on grounds that such laws are repugnant to the Supremacy Clause. Hence, this petition might properly be considered an appeal, in which case this Court has jurisdiction under 28 U.S.C. § 1254(2).

QUESTIONS PRESENTED

Section 8 of the Reclamation Act of 1902 requires the U.S. Bureau of Reclamation (the "Bureau"), in operating federal reclamation projects, to "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water. The questions raised in this petition are as follows:

1. Does section 8 require the Bureau, in acquiring its rights to unappropriated water for federal reclamation projects, to acquire such rights pursuant to the states' appropriation laws? Or, alternatively, does the Bureau acquire such rights under the "implied reservation" doctrine at the time that each federal reclamation project is authorized by Congress, notwithstanding the language of section 8?

2. If section 8 requires the Bureau to acquire its water rights under the states' appropriation laws, must the Bureau comply with conditions which the states attach to such water rights, to the extent that such conditions do not impair the congressionally-authorized purposes of federal reclamation projects?

3. If section 8 does not require the Bureau to acquire its water rights under the states' appropriation laws, must the Bureau nonetheless comply with state-imposed conditions attached to water rights which are held by the state, and which are assigned by the state to the Bureau?

4. If section 8 does not require the Bureau to acquire its water rights under the states' appropriation laws, must the Bureau nonetheless comply with conditions which the state attaches to the Bureau's water rights when the Bureau elects to acquire its water rights under the states' appropriation laws?

FEDERAL LAWS INVOLVED

This case involves an interpretation of section 8 of the Reclamation Act of 1902, 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383 (1970), a copy of which is attached hereto. App. 16.

STATEMENT OF THE CASE

The primary question raised in this case is whether section 8 of the Reclamation Act of 1902[1] requires the U.S. Bureau of Reclamation (the "Bureau"), in acquiring the right to appropriate unappropriated water for federal reclamation projects, to acquire such rights under the states' appropriation laws, and, if so, the extent to which the Bureau must comply with the states' appropriation laws.

1. Facts of the Case.

The Reclamation Act of 1902 authorizes federal construction and operation of federal reclamation projects in 16 western states.[2] Under the act, Congress has authorized many reclamation projects, the largest of which is a vast

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1. Section 8 provides:
"That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the *laws of any State* or Territory relating to the *control, appropriation, use, or distribution of water* used in irrigation, or any vested rights acquired thereunder, and the *Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws*, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383 (1970). (Emphasis added.)

2. The 16 states are Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming. 32 Stat. 388 (1902).

array of dams, reservoirs and waterways in California collectively known as the Central Valley Project (CVP). See *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275, 280-284 (1958). One of the units of the CVP is the New Melones project, authorized in 1944 and re-authorized in 1962. 58 Stat. 887 (1944); 76 Stat. 1180, 1191 (1962). The waters of the CVP, including those of the New Melones project, arise and flow solely in California.

The Bureau, which will operate the New Melones project upon its completion, applied to California's State Water Resources Control Board (the "State Board") for the right to appropriate unappropriated water for the New Melones project. The right to appropriate water in California is evidenced by a permit issued by the State Board. Cal. Wat. Code §§ 1201, 1240, 1375. The State Board issues the permit if unappropriated water is available, and if the proposed use is "reasonable and beneficial." *Ibid.* Conditions may be inserted in the permit to insure that the proposed use is "reasonable and beneficial." *Ibid.* California's permit system is similar to that of other western states whose waters are utilized by the Reclamation Act of 1902.

The Bureau's application for water rights under California law took two forms. First, the Bureau applied directly to the State Board for its own appropriative permits. Second, the Bureau also requested the State Board to approve the assignment to the Bureau of permit applications previously filed by another State agency, the State Department of Finance; the latter agency had agreed to assign its applications to the Bureau subject to approval of the State Board. The advantage to the Bureau of obtaining an assignment of these permit applications is that, upon approval, the permit-holder would have an earlier priority date than could be obtained directly by the Bureau, and thus would have seniority over many competing appropriators.[3] In essence, the Bureau thus applied directly for its own water rights, and for the assignment of water rights held by a State agency under State law.

After extensive hearings, the State Board issued Decision 1422. This decision resulted in (1) the issuance of permits applied for directly by the Bureau, and (2) the issuance of permits applied for by the State Department of Finance, and approval of their assignment to the Bureau. However, the decision imposed conditions in all permits that, although allowing immediate impoundment of water for certain project purposes, deferred impoundment of water for agricultural, municipal and industrial purposes until the Bureau develops a plan for the use of such water. Basing its conclusions on the Bureau's own evidence, the State Board found that the Bureau had failed to develop such a plan. Until such a plan is developed, the State Board stated, the State Board is unable to find that the Bureau's proposed use is "reasonable and beneficial." Thus, the State Board did not deny the Bureau's right to water, but merely deferred the right until the Bureau develops a plan for the use of the water.

2. Positions of the Parties.

The United States filed this action in a federal district court, alleging that it is not bound by the conditions in Decision 1422. It alleged that the Bureau need not acquire its water rights under the states' appropriation laws. This position is consistent with the view, unexpressed in the United States' complaint, that the Bureau acquires its water rights under the "implied reservation" doctrine, since that doctrine

3. Under California law, an applicant's priority date depends on the date of his application, not the date that the application is approved. Cal. Wat. Code §§ 1450, 1455. The priority date of the permits held by the State Department of Finance is the year 1927, since its applications were filed in that year.

allows federal agencies to acquire water for use on federal lands without complying with the states' water laws.[4] The United States also alleged that, if the Bureau elects to acquire its water rights under state law as a matter of "comity," the state must issue an appropriative permit if unappropriated water is available and cannot impose any conditions in the permit.

California alleges that section 8 of the Reclamation Act of 1902 requires the Bureau to acquire its water rights under the states' appropriation laws. Under this view, the Bureau does not acquire its water rights under the "implied reservation" doctrine. California alleges that, under section 8, the Bureau is bound by conditions which a state attaches to the

4. Under the "implied reservation" doctrine, Congress has constitutional authority under the Property Clause to reserve unappropriated water for use on federal lands that it withdraws from the public domain, and presumptively intends to exercise that authority at the time that it withdraws such lands from the public domain. See, *e.g.*, *Cappaert v. United States*, 426 U.S. 128, 138-142 (1976). This Court has suggested that Congress lacks constitutional authority to override state laws in the reclamation field. *Kansas v. Colorado*, 206 U.S. 46, 92 (1907) ("We do not mean that its [Congress'] legislation can override state laws in respect to the general subject of reclamation"). Even assuming that Congress has such constitutional authority, the question remains whether Congress intends to exercise such authority. Section 8 clearly indicates that Congress does not mean to exercise this authority, for it requires the Secretary of the Interior to acquire his water rights for reclamation projects under state law. Indeed, the "implied reservation" doctrine has only been applied in cases where water is used *on* federal lands for traditional federal purposes, and the courts should be hesitant to extend the doctrine to situations where, as here, water is ultimately used *off* federal lands by non-federal users.

An additional question raised in this case is whether the "implied reservation" doctrine is even applicable to lands which the federal government acquires by purchase or condemnation, rather than withdraws from the public domain. The doctrine has been held applicable only when the federal government "withdraws its lands from the public domain." *Cappaert v. United States, supra* at 138. The lands for the New Melones project, however, were not withdrawn from the public domain, but were acquired by purchase and condemnation. See Defendants' Exh. 3.

water right granted to the Bureau, to the extent that such conditions do not impair the purposes of the federal reclamation project. California alleges that the conditions in the permits issued under Decision 1422 do not impair the purposes of the New Melones project. California also alleges that, regardless of the effect of section 8, the Bureau is bound by conditions imposed in state-created water rights which are held by the state, and which are assigned to the Bureau at its request.

3. Ninth Circuit's Decision.

The federal district court granted summary judgment for the United States. 403 F. Supp. 874 (E.D. Cal. 1975). On appeal, the Ninth Circuit ruled that section 8 requires the Bureau to comply with the "forms" of state law by obtaining an appropriative permit from the State Board, thus rejecting the United States' position that it acquires its water rights independently of state law. App. 6-7. However, the court ruled that the state must grant the permit if unappropriated water is available; it rejected California's position that the Bureau must comply with conditions in state-issued permits to the extent that such conditions are not inconsistent with the purposes of the federal project. App. 6-7. The court also ruled that the Bureau is not bound by conditions in permits which are granted to a State agency and assigned to the Bureau at the latter's request. App. 12-16. Accordingly, it was held, the Bureau need not comply with the conditions in Decision 1422.[5] The court did not consider whether the conditions were consistent with the purposes of the New Melones project.

5. The decision was written by the senior judge of the panel. A second judge wrote a concurring opinion. App. 7-8. The third judge wrote a concurring and dissenting opinion, arguing that the Bureau need not even obtain a permit under state law. App. 8-11.

REASONS FOR GRANTING THE WRIT

1. The Lower Court's Decision Alters Several Decades of Settled Administrative Practice, and Has an Enormous Impact on the Western States Whose Waters Are Utilized by the Reclamation Act of 1902.

This is a case of historic significance in the field of federal and state water relations. For three quarters of a century, the Bureau and its predecessor agencies have complied with the appropriation laws of the western states, and with the permit systems that underlie these laws, in acquiring the right to appropriate unappropriated water for federal reclamation projects.[6] In California, for example, the Bureau has acquired 41 appropriative permits, each containing conditions, since 1925; it has, until recently, consistently complied with the conditions in the permits. See Defendant's Exhs. 1, 9, 9(a), 9(b). The Secretary of the Interior and the Bureau have frequently expressed the view that section 8 of the Reclamation Act of 1902 *requires* the Bureau to comply with the states' appropriation laws in acquiring its water rights. See n. 6, *supra*. For example, the Commissioner of Reclamation stated in 1975:

> "Each state has the duty to determine under its own statutes how its unappropriated water is to be used.

6. See *e.g.*, Defendant's Exhs. 1, 9, 9(a), 9(b); Hearings on S. 1275 before Subcommittee on Irrigation & Reclamation, Sen. Comm. on Int. & Ins. Affairs, 88th Cong., 2d Sess. 322, 323 (1964); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 735 nn. 9, 15 (1950).

As early as 1905, the Reclamation Service, the predecessor of the Bureau, reviewed the various appropriation laws of the states, and concluded that the Reclamation Service "must conform to the law and the regulations [of the states] in all particulars so far as it is possible under the operations of the reclamation act." U. S. Department of the Interior, *Proceedings of Second Conference of Engineers of the Reclamation Service* 222 (1905). In 1952, the Secretary of the Interior stated that "the rights of the United States to store, divert, and use water under the law of California . . . have their inception in certain applications . . . which have been or are to be assigned . . . to the United States, [and] in certain applications made by the United States itself." H.R. Doc. No. 416, 84th Cong., 2d Sess. 810-812 (1956).

> Since 1902, the Bureau has consistently taken the position that it will obtain under state law its rights to store and divert water for its projects recommended for Congressional authorization." Defendant's Exh. 13, p. 4.

In this case, however, the United States seeks to reverse this historic practice. It argues that section 8 does *not* require the Bureau to acquire its water rights under state law, and that the Bureau acquires its water rights independently of state law. The United States thus seeks to alter the historic relationship that has guided federal and state agencies in the reclamation field since 1902.

The Ninth Circuit's decision rejects the positions of both the United States and California. It rejects the United States' position that the Bureau acquires its water rights independently of state law, holding that the Bureau must acquire its water rights under state law. However, it rejects California's position that the Bureau must comply with conditions which the states attach to the Bureau's water rights. The decision thus effectively frees the Bureau of all conditions on its state-issued water rights in the western states, conditions with which, in California, the Bureau has complied since 1925. The decision thus alters several decades of settled administrative practice.

The Ninth Circuit's decision, if left standing, will have an enormous impact on the western states whose waters are utilized under the Reclamation Act of 1902. These states have adopted appropriation laws, consisting of permit systems, that allow the states to impose conditions on state-issued water rights that are necessary to protect the "beneficial use" of water. The power to impose conditions is the power to participate in determining the use and allocation

of water from federal reclamation projects.[7] It is critically important to these states that they participate in such determinations. Water from federal reclamation projects is not used on federal lands for traditional federal purposes, as in those cases which have recognized federal water rights under the "implied reservation" doctrine. See n. 4, *supra*. Rather, this water is ultimately used off federal lands by economic and municipal entities—farmers, industries, cities and villages—whose activities are linked with the growth and development of the states. Moreover, the western states have traditionally controlled the use of water by these entities. See n. 10, *infra*.[8] Thus, the states have a vital interest in the use and distribution of water from federal reclamation projects. California is vitally interested, for example, in whether water from the Central Valley Project is used to promote urban growth in its congested metropolitan areas or to promote agricultural production in its interior valleys.

It is not uncommon for Congress, in authorizing a federal reclamation project, to decide where, or for what purposes, project water should be used, or how much water should be impounded. We do not assert the power to alter these or

7. In this case, however, California does not seek to control the use and allocation of water, but only seeks to require the Bureau to develop a plan for the use of water before fully impounding the project's waters.

8. In California, for example, the State Board has issued other decisions, Decisions 1379 and 1400, that impose conditions in permits issued to the USBR that require the release of water from upstream storage facilities in order to protect downstream economic and ecological interests threatened by salinity intrusion, and in order to insure sufficient flows of water to protect downstream fish and wildlife. The allocation of water for these purposes is a question that is of vital importance in California, but was not addressed by Congress in authorizing the various units of the Central Valley Project.

other congressional decisions. Rather, we assert only the power to make decisions that have not been made by Congress, and that do not impair the purposes of its reclamation projects. The Ninth Circuit held that the states lack this limited, but vital, power. Its decision thus prevents the states from having a voice in decisions that affect their destiny, even where Congress has not spoken.

Although the Ninth Circuit rejected the United States' position that the Bureau acquires its water rights independently of state law, the United States' position, if accepted, would make it difficult for the western states to effectively manage their water resources. The states' appropriation laws, consisting of their permit systems, not only allow the states to participate in determining the use and allocation of project water; these systems also enable the states, by using efficient administrative procedures, to quantify the amount of unappropriated water that should be allocated to an applicant for a water right, and thus to quantify the amount of unappropriated water that remains available for use by others. However, if the Bureau need not comply with the states' permit systems, the states would be unable to administratively quantify the amount of unappropriated water that should be allocated to the Bureau. The only alternative method for quantifying the Bureau's rights would be by an adjudication of the Bureau's rights in relation to those of competing users, a process which is invariably protracted. See, *e.g.*, *Arizona v. California*, 373 U.S. 546 (1963). The states would thus lack a ready, efficient method for quantifying the amount of unappropriated waters that are available for use by non-federal users. They would lack information that is necessary in determining whether to grant or deny new applications for water

rights, and thus would be unable to properly allocate their waters. Moreover, non-federal users who have already acquired appropriative rights would have no assurance that the Bureau might not subsequently claim the water necessary to satisfy their rights, on grounds that the Bureau acquired senior rights to an unquantified amount of water under the "implied reservation" doctrine. Thus, the United States' position would inject confusion and uncertainty into western water law, a result that has been avoided because of the Bureau's historic practice of acquiring its water rights under the states' appropriation laws.

Therefore, this is a case of historic significance that will determine whether federal and state officials are to embark on a new, uncharted course in the field of reclamation, or are to continue on the same course that has been followed since 1902. The case thus merits the attention of this Court.

2. The Lower Court's Decision Is Inconsistent with, and Ignores, the Legislative History and Administrative Interpretation of Section 8.

Section 8 of the Reclamation Act of 1902 requires the Secretary of the Interior, in operating federal reclamation projects, to "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water. See n. 1, *supra*. The section, on its face, thus requires federal compliance with the states' "appropriation" laws. Under the states' appropriation laws, the states grant a water right, consisting of a permit, to a water appropriator who proposes to put water to a beneficial use, and attach conditions to the right to insure that the proposed use is, and remains, beneficial. Thus, section 8 requires federal compliance with the states' permit systems.

This conclusion is supported even more strongly by the legislative history of section 8. During the 1902 congressional debates, section 8 was opposed by representatives who argued that, if the federal government is to build and operate the projects, it should control the appropriation, use and distribution of project water. See, *e.g.*, 35 Cong. Rec. 6696, 57th Cong., 1st Sess. (1902) (remarks of Rep. Ray). The section was supported, however, by other representatives who argued that, since the western states would be vitally affected by the projects, the states should control the appropriation, use and distribution of water. See *e.g.*, *id.* at 6677-6679 (remarks of Rep. Mondell).[9] The latter group emphasized that the western states had traditionally controlled the use of water by non-federal users (even on federally-owned public domain lands) under congressional

9. Senator Clark, the chief spokesman for the reclamation bill in the Senate, stated:

> "But in the distribution of these waters . . . it is right and proper that the various States and Territories should control in the distribution." 35 Cong. Rec. 2222.

Representative Mondell, the chief spokesman for the reclamation bill in the House of Representatives, commented at length on the meaning of section 8. He stated that "Section 8 follows the well-established precedent in national legislation of recognizing local and state laws relative to the appropriation and distribution of water," that under the bill "the Secretary of the Interior would proceed to make the appropriation of the necessary water by giving the notice and complying with the forms of law of the State or Territory in which the works were located," and that the section is consistent with the acts of 1866, 1870 and 1877 in "recognizing the control of the States over the use of waters within their borders." *Id.* at 6678, 6679.

Other congressmen made similar comments. For example, Representative Burkett stated that, under section 8, "distribution should be . . . regulated and controlled by State laws and by State boards of engineers." *Id.* at 6728.

This view was also supported by President Theodore Roosevelt, who stated that "the distribution of water, the division of the streams among irrigators, should be left to the settlers themselves, in conformity with State laws . . ." *Id.* at 6775.

acts passed in 1866, 1870 and 1877,[10] and argued that the states should have equivalent control over water ultimately made available to non-federal users under the 1902 act; as state laws were the source of water rights under the pre-1902 act, they should be the source of water rights under the 1902 act as well. See n. 9, *supra*. The latter group prevailed, and section 8 was included in the act as passed. No senator or congressmen suggested that section 8 would have any effect other than providing for broad state control of water under the 1902 Act. The Ninth Circuit's decision, by denying the states any discretionary control of such water, is consistent with the result that was favored by the congressional opponents of section 8, and that was rejected by Congress as a whole.

The Ninth Circuit ignored this legislative history. It equally ignored the historic administrative practice of the Bureau in complying with the states' permit systems. The court instead rested its decision primarily on this Court's recent companion decisions in *Hancock v. Train*, 426 U.S. 167 (1976), and *Environmental Protection Agency (EPA) v. California*, 426 U.S. 200 (1976), involving interpretations of the Clean Air Act and the Federal Water Pollution Control Act. In *Hancock* and *EPA*, it was held that the states, which are authorized under the acts to adopt permit programs for the control of air and water quality, cannot apply their permit programs to federal agencies, because such

10. The Mining Act of 1866, as amended in 1870, and the Desert Land Act of 1877 "severed" the water from the public domain lands of the western states, and required non-federal water users on the public domain lands to comply with state appropriation laws even though they acquired their lands under federal law. Thus, the acts gave the states broad, even "plenary," control over the use of water on non-federal lands. See *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *Jennison v. Kirk*, 98 U.S. 453 (1878).

authority was not spelled out in "clear and unambiguous" terms. 426 U.S. at 179, 211. Neither case involved an interpretation of section 8. Ignoring that distinction, the Ninth Circuit held that, since section 8 does not specifically refer to the states' permit systems, the section does not require federal compliance with the states' permit systems. If this is so, it is difficult to understand the basis for the court's conclusion that the section requires federal compliance with the "forms" of the states' permit systems.

More importantly, section 8 clearly and unambiguously requires federal compliance with the states' permit systems. The legislative history and administrative interpretation of the section indicate that the Bureau must comply with the states' appropriation laws; since the states' permit systems are the essence of their appropriation laws, the only way that this congressional objective can be realized is by federal compliance with the permit systems. This Court has stated, more than once, that a statute must be interpreted consistently with its legislative history, see, *e.g., Train v. Colorado Pub. Int. Res. Group*, 426 U.S. 1 (1976), and that weight must be given to the administrative interpretation of a statute, see, *e.g., Udall v. Tallman*, 380 U.S. 1 (1976). The Ninth Circuit reached its result only by ignoring those rules of statutory construction. It overturned a clearly-stated congressional objective only because Congress did not think to mention the precise procedures by which this result would be accomplished, procedures that were then in a state of development. However, this Court recently observed that, as Justice Holmes remarked, "We are not free to say to Congress 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *Rosebud Sioux Tribe v. Kneip*, ... U.S. ....., 45 U.S.L.W. 4349 (1977).

The Ninth Circuit appeared to assume that the *Hancock* and *EPA* decisions establish a rule of law that operates independently of the normal guides to statutory analysis. That assumption finds no support in the *Hancock* and *EPA* decisions, however. There, the Court stated that the legislative history in question supported the position of the federal agencies rather than the states, 426 U.S. at 187-190, 215, and that its decisions were consistent with the administrative practice of federal agencies under the acts, *id.* at 226-227. Thus, the decisions do not support the Ninth Circuit's decision, and are not relevant here.

3. The Lower Court's Decision Conflicts with This Court's Analysis in the Nebraska, Ivanhoe and City of Fresno Decisions.

In *Nebraska v. Wyoming*, 295 U.S. 40 (1935), this Court described the effect of section 8 as follows:

> "All of the acts of the Reclamation Bureau in operating the reservoirs so as to *impound and release* waters of the river are *subject to the authority of Wyoming*. . . . [T]he Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain *permits* and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law." *Id.* at 42, 43. (Emphasis added.)

Substantially the same language was repeated in *Nebraska v. Wyoming*, 304 U.S. 545, 629 (1945). The Ninth Circuit's decision is inconsistent with these decisions.

This Court has limited the effect of state law under section 8 in instances where state laws conflict with a specific provision of federal reclamation law. In *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 291 (1958), it was held that, notwithstanding section 8, state law cannot override the

"specific and mandatory" provisions of section 5 of the Reclamation Act of 1902, which limits the availability of water under the act to lands not in excess of 160 acres.[11] In *City of Fresno v. California*, 372 U.S. 627 (1963), it was held that, notwithstanding section 8, state law cannot prevent the Bureau from exercising its powers under section 7 of the Reclamation Act of 1902 to acquire water rights by condemnation.[12] These cases indicate that state law must yield when it conflicts with a "specific and mandatory" federal reclamation law, notwithstanding section 8. This result is consistent with the rule that, in conflicts between a general statute (such as section 8) and a specific statute (such as a specific federal reclamation law) concerning the same subject matter, the specific statute controls. See, *e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 488-490 (1973).

In this case, however, there is no conflict between state law and federal law. Nothing in federal law authorizes the Bureau to acquire unappropriated water without complying with state law; in fact, the only provision authorizing the Bureau to acquire unappropriated water—section 8—specifically mandates it to comply with state law. Further, nothing in federal law precludes a state from deferring the

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11. The Court stated:
> "Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5." *Id.* at 292.

The State of California joined with the United States in urging that state law could not override the acreage limitation in § 5, prompting the court to observe that "there is no clash here between the United States and the State of California." *Id.* at 279.

12. The Court stated:
> "Section 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others." *Id.* at 630.

acquisition of such water by the Bureau until it develops a plan for the use of the water. Hence, there is no conflict between the conditions in Decision 1422 and the purposes of the new Melones project. Nor does the United States argue otherwise; in fact, it concedes that it is barred from making such an argument. App. 9. Thus, the analysis in the *Ivanhoe* and *City of Fresno* cases, coupled with the analysis in the two *Nebraska* decisions, affirms the validity of the conditions in Decision 1422. The Ninth Circuit's decision, which fails to consider whether the conditions are inconsistent with specific federal laws or specific project purposes, thus conflicts with the analysis in all these decisions.

4. The Lower Court's Decision Results in the Creation of a New Water Doctrine That Is Unsupported by the Reclamation Act of 1902.

The Ninth Circuit's decision results in the creation of a new, aberrational water doctrine, one that is without precedent in western water law. This new doctrine, based on section 8, requires the Bureau to acquire a water right under state law, but not to comply with conditions attached to the water right. As noted by this Court, there are three major types of water rights in the western states: appropriative rights, riparian rights and reserved (or "implied reservation") rights. See *United States v. District Court*, 401 U.S. 520, 524 (1971). The water right which the Bureau must acquire under the majority opinion, however, does not fall into any of these categories. Since the Bureau must acquire a state-issued water right, it does not have a reserved right. Since it need not comply with conditions attached to the right, it does not have an appropriative right. Thus, the majority opinion results in the judicial

creation of a fourth type of water right, one that is a blend of an appropriative right and a reserved right. If such a water right is to be judicially created, certainly its genesis deserves to come from the nation's highest judicial body.

It is difficult to understand how section 8 supports the creation of the new water doctrine suggested by the Ninth Circuit. As nothing in the section specifically refers to a permit, nothing therein can be construed to support a distinction between a permit and its conditions. Hence, if the section is sufficiently "clear and unambiguous" to require federal acquisition of a permit, it is sufficiently "clear and unambiguous" to require federal compliance with conditions in the permit. Thus, it can logically be concluded only that the Bureau must fully comply with state permit systems, or that it is wholly immune from such systems; it cannot logically be concluded that the Bureau must comply half-way with these systems, as the Ninth Circuit has done. The lower court's decision thus represents more a judicial rather than a legislative philosophy of reclamation.

Judge Wallace, in his concurring and dissenting opinion, correctly notes that the majority opinion results in the development of a new "federal common law," and expresses doubts whether the court should engage in "judicial rulemaking in an area as complex and sensitive as state-federal relations over water." App. 10. He also recognizes that the United States' position would result in "great potential for uncertainty," because of the states' inability to quantify their unappropriated water under that position. App. 9-10. However, he embraces the United States' position "with reluctance," because he believes that this Court's recent decisions in *Hancock* and *EPA* offer no other choice. App. 8. The resulting "problem," he writes,

will have to be changed by Congress. App. 11. Judge Wallace's observations show how a rigid application of the *Hancock* and *EPA* analysis in this case leads to a dilemma, in that the court must either re-write federal reclamation law or embrace a concededly harmful result that requires legislative correction. The majority chose the former, and Judge Wallace the latter.

There is another judicial recourse that avoids the dilemma posed by Judge Wallace. Section 8 should be interpreted as requiring the Bureau to comply with state appropriation laws, including state permit systems, but only to the extent that the purposes of federal reclamation projects are unimpaired. This approach fully protects the federal interest in reclamation, by insuring that the states cannot interfere with that interest. It also protects the state interest in reclamation, by allowing the states to act in instances where the federal interest is neutral. Above all, it gives meaning to both the letter and spirit of section 8, by respecting the accommodation between federal and state interests worked out by Congress in 1902. Thus, this approach does not attempt to re-write the federal reclamation laws, as does the majority opinion below, or reach a concededly harmful result that will have to be rectified by Congress, as does Judge Wallace's opinion.

This suggested approach is consistent with this Court's decisions in the two *Nebraska* cases, where the Court stated that the Bureau must obtain permits under Wyoming law and that the "impound[ment] and release [of water] . . . is subject to the authority of Wyoming." 295 U.S. at 42, 43. This approach is also consistent with this Court's analysis in the *Ivanhoe* and *City of Fresno* cases, where the Court held that the states' authority under section 8

is subject to the "specific and mandatory" provisions of federal reclamation law. 357 U.S. at 291. This approach is essentially an application of the doctrine of preemption in the interpretation of section 8.[13] That is, a state law should be upheld to the extent that it is not preempted by a specific act of Congress, including the specific purposes of its reclamation projects. In applying the preemption doctrine, the Court frequently interprets federal statutes in a manner that avoids state intrusions on federal interests, and yet accommodates state interests to the extent that no such intrusions occur. The same approach should be followed in interpreting section 8. This approach respects history, and does not attempt to re-write it.

5. By Voiding Conditions in State-Held Water Rights Assigned to the Bureau, the Court Has Sanctioned an Unconstitutional Violation of California's Property Rights.

The Ninth Circuit held that the Bureau is not bound by conditions attached to water rights held by an agency of the State of California, and assigned by California to the Bureau at its request. The question is one of importance, for a substantial portion of the water rights held by federal agencies in California are based on similarly-assigned

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13. Under the preemption doctrine, assuming that Congress has not occupied the field, a state law is invalid if it conflicts with a specific federal law. See, *e.g.*, *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *Goldstein v. California*, 412 U.S. 546 (1973). This Court has recently shown greater willingness to sustain state laws against challenges that they have been preempted by federal laws, now requiring "a flexible conception of federal-state relations rather than one of absolute federal supremacy." Note, "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court," 75 *Colum. L. Rev.* 623, 641 (1975). In particular, federal laws will not be deemed to preempt a field "traditionally occupied by the States" in the absence of a "clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, ... U.S. ....., 45 U.S.L.W. 4323, 4324 (1977).

water rights.[14] This question is one that has never been addressed by this Court.

According to the Ninth Circuit, the State agency's rights were inchoate at the time that they were assigned to the Bureau, since the rights were based on applications that were not yet approved by the State Board; the rights were not perfected until the State Board approved the applications, and at that time the rights were held by the Bureau. The court stated that, at the time that the assigned applications were approved, the Bureau "was acting in the same capacity as when it filed its own applications," and that its "substantive rights arose from the Congressional legislation, not from the assignment." App. 14. Hence, the court concluded, the Bureau is not subject to conditions attached to the approved applications. App. 12-16.

However, the decision overlooks the fact that the right assigned to the Bureau, however inchoate, has the incident of an early priority date, based on the year—1927—that the State agency filed its applications. This early priority date is an important feature of the perfected right now held by the Bureau, for it enables the Bureau to defeat the claims of competing water users with post-1927 priority dates. This important feature is a product of state law, not federal law. Federal law, at most, authorizes the Bureau to obtain a priority date based on the date of its *own* applications, even assuming that it is not bound by conditions in state-issued permits. However, federal law clearly

14. The total amount of water which is subject to State-filed applications assigned to federal agencies in California, and hence subject to *potential* use, is approximately 9,000,000 acre-feet in storage. The total amount of water *actually* used by the Bureau in the CVP in 1972 was approximately 6,000,000 acre-feet. The total amount of water actually used by *all* users in California in 1972 was approximately 27,000,000 acre-feet. Memorandum, "Water Supply and Water Rights Data," Governor's Commission to Review California's Water Rights Law, August 4, 1977.

does not authorize the Bureau to obtain an earlier priority date based on the applications of the State itself. The Bureau can acquire the latter benefit only by electing to acquire its water rights under state law, independently of its rights under federal law. The Bureau could not have obtained the 1927 priority date without obtaining the assignments. Hence, the decision is fundamentally wrong in stating that the Bureau's "substantive rights arose from the Congressional legislation, not from the assignment." App. 14. It rights arose directly from the assignments. Therefore, as an assignee, the Bureau could not obtain greater rights than were held by the assignor, the State agency. It is thus limited by conditions in the permit, just as the assignor would have been.

The Ninth Circuit has confused the difference between a water right acquired by the Bureau under *federal* law pursuant to section 8, and a water right acquired under *state* law independently of section 8. If it elects to obtain one such right, it cannot obtain the benefits of the other. If it acquires a right under federal law, it obtains a permit free of conditions, according to the court's decision; however, it cannot obtain the 1927 priority date that belongs to the State. Conversely, if it acquires an assigned right under State law independently of section 8, it obtains the 1927 priority date, but is bound by conditions which the State attaches to the right. The Ninth Circuit's decision awards the Bureau the benefits of both federal and state law, by allowing the Bureau to obtain a condition-free permit with a 1927 priority date. Thus, the Bureau is allowed to gain the benefit of a right that belongs to the State, without complying with the burdens which the State attaches to the right.

This result sanctions an unconstitutional invasion by the federal government of the property rights held by the

State of California, a result which should not be tolerated by a Court which has recently reaffirmed the states' immunity from such invasions. See *National League of Cities v. Usery*, ... U.S. ....., 44 U.S.L.W. 4974 (1976). This result allows a federal agency to acquire a valuable property right held by the State without complying with State-imposed limitations on the right, simply because the right is "inchoate" at the time of its acquisition. However, the inchoate nature of the right is irrelevant. It is only relevant that the right is valuable, and belongs to the State. Suppose, for example, that a state holds an option to buy a building, and agrees to sell the option to a federal agency on condition that the federal agency complies with the state's zoning laws. Clearly the federal agency is constitutionally required to comply with the state's zoning laws if it purchases the option, notwithstanding the inchoate nature of the option. This is not to suggest that the federal agency may lack authority to independently acquire the building under its constitutional powers, and thus avoid the encumbrance of the state's zoning laws. However, if the federal agency elects to proceed under state law in order to gain the benefits of that law, it is clearly bound by the encumbrances of state law. Such is the constitutional imperative of the Tenth Amendment. Cf. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 736, 739, 742 (1950).[15]

15. The court's decision was premised on several incorrect statements of the record. For example, the court stated that, "when the State applied for water rights *in 1952*," Congress had already authorized federal construction of the project, an event which occurred in 1944. App. 15. (Emphasis added.) Accordingly, the court stated, the State agency filed its applications in the expectation that they would be assigned to the Bureau. App. 14-15. In fact, the State agency filed its applications in 1927, not 1952. Defendant's Exh. 1, p. 1. At the time that the applications were filed, it was expected that the projects would be built by the State rather than the federal government, and hence it was not expected that the applications would be assigned to the Bureau.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be granted.

Respectfully submitted,

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Further, the court stated that the applications of the State Department of Finance "were assigned by the Department to the Bureau of Reclamation," and that "there is no contention that the assignment was expressly conditioned upon acceptance of whatever permit conditions the State might impose." App. 13-14. However, this statement overlooks the fact that the assignments did not become effective until their approval by the State Board, at which time the State clearly expected that the Bureau would be bound by the conditions therein. Moreover, the Bureau, in applying to the State Board for approval of the assignments, expressly agreed that the resulting permits "shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article," and that the permit shall be effective insofar as it is "in conformity with this division of the [California] Water Code." Defendant's Exh. 3(a), 3(b).

Appendix 1

Filed—Apr 1 1977
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. The State of California, State Water Resources Control Board, W. W. Adams, Chairman, Ronald B. Robie, Vice Chairman, Roy E. Dodson, Jean Auer, and W. Don Maughan, as members of the State Water Resources Control Board, Defendants-Appellants.	No. 75-3554

OPINION

Appeal from the United States District Court for the Eastern District of California

Before: DUNIWAY, CARTER and WALLACE, Circuit Judges

DUNIWAY, Circuit Judge:

The State of California and its State Water Resources Control Board appeal from a judgment for the United States entered by the District Court for the Eastern District of California. The opinion and judgment of that court

are reported in *United States v. State of California*, E.D. Cal., 1975, 403 F. Supp. 874. The judgment of the district court appears at 403 F. Supp. 902-03. The principal questions are (1) whether Section 8 of the Reclamation Act of 1902, 32 Stat. 388, now 43 U.S.C. § 383, requires that the United States apply to the California State Water Resources Control Board for a permit to appropriate unappropriated water from the Stanislaus River for the New Melones project, and, (2) if so, what conditions, if any, the Board can attach to a permit that it grants. The questions are of great importance, and we have given them careful attention.

Our study of the record and the law convinces us that the judgment must be affirmed, substantially for the reasons stated by Judge MacBride in his opinion.

Two recent decisions of the Supreme Court strengthen our conviction. In *Hancock v. Train*, 1976, 426 U.S. 167, the question was whether § 118 of the Clean Air Act, 42 U.S.C. § 1857f, permits a state to require federally owned or operated installations to obtain a permit to operate, as required by the state's federally approved plan for assuring air quality. The pertinent language of § 118 reads:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result in the discharge of air pollutants, shall comply with federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.
> 42 U.S.C. § 1857f.

The Court states its holding as follows:

> Kentucky, like the Court of Appeals for the Fifth Circuit in *Alabama v. Seeber*, 502 F.2d 1238, 1247-1248 (1974), finds in § 118 a sufficient congressional authorization to the States, not only to establish the amount of pollutants a federal installation may discharge, but also to condition operation of federal installations on securing a state permit. We disagree because we are not convinced that Congress intended to subject federal agencies to state permits. We are unable to find in § 118, on its face or in relation to the Clean Air Act as a whole, or to derive from the legislative history of the Amendments any clear and unambiguous declaration by the Congress that federal installations may not perform their activities unless a state official issues a permit. Nor can congressional intention to submit federal activity to state control be implied from the claim that under Kentucky's EPA-approved implementation plan it is only through the permit system that compliance schedules and other requirements may be administratively enforced against federal installations. *Id.* at 180-81.
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> • • • •
>
> In view of the undoubted congressional awareness of the requirement of clear language to bind the United States, our conclusion is that with respect to subjecting federal installations to state permit requirements, the Clean Air Act does not satisfy the traditional requirement that such intention be evinced with satisfactory clarity. Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest. *Id.* at 198 (footnotes omitted).

In *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 1976, 426 U.S. 200, the Court reached a similar conclusion as to the effect of § 313 of the Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1323. That section provides that federal installations must "comply with Federal, State, interstate, and local requirements respecting control and

abatement of pollution to the same extent that any person is subject to such requirements." California and Washington sought to apply the permit requirements of their programs. We held that they could do so (511 F.2d 963), but the Supreme Court reversed. Applying the principles of *Hancock, supra*, the Court said:

> Our decision in this case is governed by the same fundamental principles applied today in *Hancock v. Train, ante*, at 179: federal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous. *Id.* at 211.
>
> Except for the reference to service charges, § 313 is virtually identical to § 118 of the Clean Air Act, 42 U.S.C. § 1857f. Taken alone, § 313, like § 118 of the Clean Air Act, states only to what extent—the same as any person—federal installations must comply with applicable state requirements. Section 313 does not expressly provide that federal dischargers must obtain state NPDES permits. Nor does § 313 or any other section of the Amendments expressly state that obtaining a state NPDES permit is a "requirement respecting control or abatement of pollution."
>
> *Id.* at 212-13 (footnote omitted).

The language of § 8 of the Reclamation Act of 1902, set out in the opinion of the district court, 403 F. Supp. 885, is no more specific in subjecting federal projects to state permit requirements than are the statutes construed in the foregoing cases. Our view that the judgment in this case should be affirmed is, we think, supported by the principles applied in those cases. Indeed, we find that California's claim in this case that the United States must obtain a permit and comply with conditions embodied in it is less

supportable than the claims of Kentucky in *Hancock, supra*, and of California and Washington in *Environmental Protection Agency, supra*. In each of those cases, it could more plausibly be argued that Congress did intend to subject federal installations to state permit requirements than in this case. When the Congress enacted § 118 of the Clean Air Act and § 313 of the Water Pollution Control Act Amendments of 1972, the use by the states of the permit device as a means of enforcing their laws in these areas was well known. The language of the two Acts, subjecting federal instrumentalities to state laws, is very broad. Yet the Court declined to read either section as requiring compliance with state permit requirements.

On the other hand, when § 8 of the Reclamation Act was adopted in 1902, California's permit requirement did not exist. At that time, under the Civil Code of 1872, §§ 1410-1422, surplus water was appropriated by the physical act of taking and diverting it to beneficial use. An appropriator could post a notice of taking at the point of diversion and record a copy with the county recorder. If the appropriator was diligent in completing the work for the diversion, his rights would date back to the posting of the notice. The statute did not create appropriative rights; it merely provided evidence of the date of appropriation. *A fortiori*, then, we cannot read § 8 as requiring compliance with California permit requirements that did not exist when § 8 was adopted.

In 1913, California enacted the Water Commission Act (Cal. Stats. 1913, c. 586) which created the State Water Commission and provided a statutory procedure that could be followed in the appropriation of unappropriated water flowing in any natural channel "for useful and beneficial

purposes." The Act became effective, following a referendum vote, in 1914. In 1923, an amendment made the statutory procedure the exclusive method of appropriating water. (Cal. Stats. 1923, c. 87.) The Act, as amended, is now part of the California Water Code, Divisions 1 and 2.

As the district judge concluded, a major purpose of § 8 of the 1902 Act was to recognize and protect state water law, particularly the state law doctrine of appropriative rights to water. 403 F. Supp. at 888. Similarly, the Clean Air Act and the Water Pollution Control Act amendments give effect to state law and require compliance with it by federal installations. Indeed, those acts are more specific than § 8 of the 1902 Act. Yet the Court has declined to read them as subjecting federal installations to state permit requirements, even though the use of permits by the states as a means of enforcing their clean air and water pollution laws was known. To read § 8 of the 1902 Act as requiring compliance with laws that did not then exist and procedures not made compulsory by California until 1923—over 20 years later—would fly in the face of the *Hancock* and *Environmental Protection Agency* decisions. We could only do so if the language of § 8 were much more specific than it is.

In one respect, however, we disagree with Judge MacBride's decision. He says, 403 F. Supp. 889-90:

> Indeed, while the Congressional history of the 1902 Act indicates broad federal purpose and authority in the operation and control of federal reclamation projects, the comity inherent in a federal system would not permit an overbroad usurpation of state sovereignty. Accordingly, the federal government is required, when acquiring water for federal reclamation projects, to comply with the forms of state law, including application to state water boards where necessary, for two purposes: (1) to enable the state to determine, according to its law, whether there is sufficient unappropriated water available for the project; and (2) to give notice to the state of the scope of the project.

His judgment provides:

> (1) The United States can appropriate unappropriated water necessary for use in any federal reclamation project within the State of California, but must first, in accordance with comity, apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water.
>
> (2) When the United States submits applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available.

We agree with this result, but we do not agree that the requirement is one of comity. It is a legal requirement of § 8.

Under § 8, the national government, in constructing and administering reclamation projects, must recognize and cannot nullify either water rights created by state laws or the laws that create them. But enforcement of the government's duty via the permit device is not handed over to the state.

The phrase "in accordance with comity" is stricken from paragraph (1) of the judgment. In all other respects, the judgment is affirmed.

CARTER, Circuit Judge, concurring specially:

I concur in the above opinion. *Hancock v. Train,* 426 U.S. 167, 44 U.S.L.W. 4767 (June 7, 1976), and *Environ-*

mental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 44 U.S.L.W. 4781 (June 7, 1976), make improper, under existing statutes, any state requirements in the nature of permits. The cases hold that it is for the Congress to explicitly determine whether to subject federal agencies to state permits.

I would suggest, however, that it may be one thing for the Congress to provide that a state may require a permit to assure proper air or water quality standards of a federally-owned or operated installation; it is quite another thing to permit a state to require permits for the very operation of such a facility. I cannot envision the Congress providing that the states, by a permit process, may control the operation of federally constructed, funded, and operated water and power projects.

WALLACE, Circuit Judge, Concurring and Dissenting:

Although recent Supreme Court decisions leave me with no clear concept of what Congress must say in order to require the federal government to comply with state law, I am persuaded that the language of the state reviewed here is insufficient to validate California's permit procedure. While the "shall" in section 8 of the 1902 Reclamation Act appears to be mandatory, and while the Bureau of Reclamation's conduct over nearly three-quarters of a century indicates that it had no doubt of the necessity for compliance with state law, I cannot say that the language of the section is any clearer or less equivocal than that rejected as insufficient in *Hancock v. Train,* 426 U.S. 167 (1976), and *EPA v. California ex rel. State Water Resources Control Board,* 426 U.S. 200 (1976). Thus, with reluctance I concur that the statute does not require the Bureau of Reclamation to secure, pursuant to state law, the permit in question.

However, unlike the majority,[1] I would go no further. Nothing in *Hancock* or *EPA* necessarily forecloses federal compliance with state-imposed requirements not involving permits. Indeed, the more than 70 years of cooperative development of water resources in the West under the Reclamation Act attest to the wisdom in providing non-exclusive control over this limited asset.

Also, I believe that we must disapprove that portion of the district court's order that requires the federal government, "in accordance with comity, [to] apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water" and that requires the Board to "grant such applications if unappropriated waters are available." *United States v. State of California, supra,* 403 F. Supp. at 902. By construing section 8 under compulsion of *Hancock* and *EPA* as not requiring Bureau of Reclamation compliance with state appropriation procedures, we bring an element of uncertainty to the administration of water resources. Absent some mechanism to convey the information, the states cannot know what amount of unappropriated

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1. The majority's approach to the permit issue seems to be premised on the belief that the impermissible aspect of the state's scheme is not the permit requirement but rather the *conditions* the state has attached to the permit. California has conceded all along that, although the Bureau must seek and secure a permit, the state has no power to attach to the permit conditions inconsistent with or contradictory to congressional purposes underlying the particular reclamation project. California believes, however, that no such conflict exists in this case.

In a proceeding before a state agency, it was determined that the conditions imposed by California were valid. The federal government did not appeal this decision. Accordingly, the government conceded at oral argument that it is precluded by the doctrine of res judicata from raising the issue anew in this case.

water remains for private use in a watershed after a portion is appropriated by the Bureau. The "comity" theory and application/notice requirement of the district court are an effort to patch this tear caused by the new construction of section 8.

It is a wayward effort. Comity is a concept of deference and voluntary action. *Zink v. Estelle,* 403 F. Supp. 656, 659 (S.D. Tex. 1975); *Galloway v. Watts,* 395 F. Supp. 729, 731 (D. Md. 1975). To use such a concept as a basis for *requiring* affirmative federal action seems peculiarly incongruous. Accordingly, I agree with the majority's disapproval of the district court's comity theory.

But the majority does no better in its effort for it provides no defensible basis for requiring federal agency action. Accordingly, I must reject that portion of the majority's opinion which directs the federal government "to comply with the *forms* of state law" (emphasis added) because "[i]t is a legal requirement of § 8." Majority op. at 6.[2]

Concededly where two sovereigns, acting independently, administer water rights in the same watershed, there is a great potential for uncertainty. But that is what our *Hancock*- and *EPA*-inspired construction of section 8 means.

2. While the majority fails to provide us with any legal reasoning for requiring compliance with "the forms of state law," I can only assume that the requirement is derived from federal common law. Before embarking on this new and uncharted course of constructing common law, I would ask: Do we have the legal competency to fashion any rules in this area? Even if we do, is it wise for us to undertake the task? While I entertain doubts that the first question can be answered affirmatively, I am convinced that we ought not undertake the task of judicial rulemaking in an area as complex and sensitive as state-federal relations over water.

If my assumption regarding the federal character of the application/notice requirement is incorrect, then that requirement must be viewed as one of state law. If derived from state law, there would be an inconsistency with the majority's initial conclusion that section 8 does not require federal agency compliance with state permit procedures.

The majority has failed to find a defensible legal basis to give effect to its desire to avoid this problem. Unfortunately, I can see no such basis either. Accordingly, we have, I believe, no alternative but to leave it to the legislative branch to devise a solution. Therefore, I would go no further than to disapprove the permit procedure in question.

Appendix 2

United States Court of Appeals
For the Ninth Circuit

AUG 12 1977—

Emil E. Melfi, Jr. Clerk
U. S. Court of Appeals

United States of America, Plaintiff-Appellee, vs. The State of California, State Water Resources Control Board, W. W. Adams, Chairman, Ronald B. Robie, Vice Chairman, Roy E. Dodson, Jean Auer, and W. Don Maughan, as members of the State Water Resources Control Board, Defendants-Appellants.	No. 75-3554

OPINION

Appeal from the United States District Court
for the Eastern District of California

On Petition for Rehearing

Before: DUNIWAY, CARTER and WALLACE,
Circuit Judges

DUNIWAY, Circuit Judge:

In its petition for a rehearing, California relies upon an argument that it made, but did not emphasize, in its briefs on appeal, an argument that we overlooked. It points

to the fact that certain of the permits involved in this case had their origin in two applications filed by the State Department of Finance. These applications were then assigned by the Department to the Bureau of Reclamation. The State points out that its Department of Finance, had it prosecuted the applications to the obtaining of permits, would certainly have been bound by whatever conditions the State Board might impose. It follows, says the State, that the Bureau, assignee, is also subject to those conditions because, as assignee, it could acquire no greater rights than its assignor. The argument is superficially appealing, but, on reflection, we reject it.

The argument overlooks two considerations. The first is that the assignment was of an application, not of a permit containing conditions. The second is that the assignee was the Bureau, a Federal agency exercising powers conferred upon it by the Congress of the United States, whose valid enactments are "the supreme law of the land" (U.S. Const. Art. VI, § 2).

Under California law, an application for a permit to appropriate surplus or unappropriated water confers nothing upon the applicant as against the state; all that it confers is a priority over later applicants if the application is granted. Cal. Water Code § 1450 states:

> Any application properly made gives to the applicant a priority of right as of the date of the application until such application is approved or rejected. Such priority continues only so long as the provisions of law and the rules and regulations of the board are followed by the applicant.

Cal. Water Code § 1455 then adds: "The issuance of a permit continues in effect the priority of right as of the date of the application. . . ."

The Supreme Court of California interpreted these provisions in *Madera Irrigation District v. All Persons,* 1957, 47 Cal.2d 681, 690, 306 P.2d 886, *rev'd* on other grounds, *Ivanhoe Irrigation District v. McCracken,* 1958, 357 U.S. 275. There the court stated:

> The filing of an application under the present law is comparable and of like effect to the posting and recording of notice or commencement of actual construction work under the rules which had previously prevailed. . . . The Water Code provides that the effect of filing an application confers, for all practical purposes, a priority only.

To the same effect, see *United States v. Fallbrook Public Utility District,* S.D. Cal., 1958, 165 F. Supp. 806, where Judge James M. Carter stated (at 855):

> Until the application to appropriate is acted upon by the State Water Rights Board favorably to the applicant, and the issuance of a permit is directed, the applicant has no property right of any kind as against the state. He has an inchoate, incipient, conditional right of procedural priority over later applicants. . . .

That is all that the State Department of Finance had, and all that it could assign to the Bureau.

When the Bureau became the assignee of that "inchoate, incipient, conditional right," it was acting in the same capacity as when it filed its own applications. It was acting under the same Federal laws, and, absent those laws, it would have had no right to appropriate any water. Its substantive rights arose from the Congressional legislation, not from the assignment. There is no contention that the assignment was expressly conditioned upon acceptance of whatever permit conditions the State might impose. On the contrary, the State's briefs make it clear that the State Department of Finance filed the applications for one purpose only, to obtain, not for itself, but for the Bureau when

the project finally went forward, a priority date as appropriator.[1]

We conclude that the Bureau, as assignee of an application, is no more subject to the imposition of conditions by the Board than it is as an original applicant.

The petition for a rehearing is denied.

WALLACE, Circuit Judge, concurring in part:

I concur in part. Concluding that the first of Judge Duniway's reasons to deny the petition is more than adequate

---

1. Originally, the Central Valley Project, of which New Melones is a part, was to be constructed and operated by the State. Therefore, as California told us in its opening brief, its Department of Finance began in 1927 filing applications for permits to appropriate water for the Central Valley Project,

> so that the State—in anticipation of State construction of the CVP—could obtain a prior right to the use of water, as against private appropriators who submitted later applications; . . . .
> (Brief, page 5)
> As noted earlier, Decision 1422 approved the assignment of two applications to the Bureau, and issued permits to the Bureau on the basis of these applications; these applications had originally been filed by a State agency for the purpose of obtaining an early priority date.
> (Brief, pages 83-84)

There is a similar assertion in California's Reply to Response to Petition for Rehearing, page 6:

> [T]he State Department of Finance, in applying for water rights in 1927, did not apply for the purpose of ultimately encumbering the Bureau's water rights. Rather, it applied because it was expected that the State rather than the federal government would build and operate the Central Valley Project, and the State wanted to obtain the earliest possible priority dates in its own water rights.
> (footnote omitted)

It was apparent in 1944 that New Melones was to be built and operated as a Federal Project. It was authorized in the Flood Control Act of 1944, 58 Stat. 887. See also § 203 of the Flood Control Act of 1962, 76 Stat. 1191. Thus, when the State applied for water rights for New Melones in 1952, its purpose was, as it says, to obtain early priority dates, and its intent must have been to do what it ultimately did, to assign its applications to the Bureau of Reclamation, which was to build and operate the project.

("the assignment was of an application, not of a permit containing conditions"), I would not reach the constitutional issue. *See Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Appendix 3

Section 8 of the Reclamation Act of 1902:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affecting any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 32 Stat. 390 (1902); 43 U.S.C. §§ 372, 383 (1970).

Supreme Court, U. S.
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Brief of Amici Curiae States of Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Oklahoma, South Dakota, Texas, Utah, Washington and Wyoming in Support of Petition for Writ of Certiorari

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STATEMENT OF INTERESTS OF AMICI CURIAE

Congress enacted the Reclamation Act of 1902 to tame and use the unharnessed waters and to reclaim the arid and semi-arid lands of the West. The Western States named herein as *amici curiae* constitute, with California, each of the states which have since 1902 been subject to the provisions of the Act. Pursuant to the Act, reclamation projects authorized by Congress span these *amici* states in the form of storage reservoirs, diversion dams, and other water works. Water deliveries from these project facilities at

the end of 1974 totaled 29.7 million acre-feet and served a record high of 17.6 million people (31% of the population of the 17 Western States). U.S. Department of Interior, Bureau of Reclamation, *Water and Land Resource Accomplishments,* 1974: Summary Report, 2.

When the United States, by the passage of the Reclamation Act, entered the field of building large scale irrigation projects, it carried forward a policy which it had long approved, encouraged and used: a policy of recognizing the laws of the states and territories as the sources of water rights. Thus, one of the fundamental concepts of the 1902 Act was Section 8:

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . ." 32 Stat. 390 (1902), 43 U.S.C. § 383 (1970).

An objective appraisal of the text of this provision would lead any fairminded observer to the conclusion that Congress intended that the government's right to divert and impound water for a reclamation project must be received from the state, and further that the acquisition of project water should be treated as an appropriation, which, consistent with congressionally approved western water laws, can only be based on beneficial use. *United States v. Bennett,* 207 F. 524 (9th Cir. 1913); *West Side Irrigation Co. v. United States,* 246 F. 212 (9th Cir. 1917); *see* F. J. Trelease, *Arizona v. California,* 1963 Supreme Court Review 158, 189.

The Bureau of Reclamation, charged with administering the Act, has historically followed the plain instructions of Section 8 in acquiring water for reclamation projects. In *United States v. Gerlach Livestock Company,* 339 U.S. 725 (1950), the Supreme Court characterized the attitude of the Bureau with respect to Section 8 as follows:

> "The Bureau of Reclamation and the Secretary of the Interior have consistently, through the forty two years since the 1902 Act, been zealous in maintaining compliance with Section 8 of the 1902 Act. They are proud of the historic fact that the reclamation program includes as one of its basic tenants that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws. Ample demonstration of the effect of this law and policy of administration, in action, has been given in connection with the Central Valley Project. Water filings made by the state have been obtained by the Bureau of Reclamation by assignment. . . ." 339 U.S. 725, 740-41, n. 15.

The Ninth Circuit's decision pays little heed to either the language or purposes of Section 8, or to the way in which the Section has historically been recognized and followed by federal and state agencies since 1902. According to the Ninth Circuit, the Section requires the Bureau of Reclamation to apply for an appropriative permit from the state, requires the state to issue the permit if unappropriated water is available, and frees the Bureau of conditions imposed in such permits by the state. This is not what the Section says, or how the Section has been historically applied. The court has thus sanctioned an alteration of several decades of settled administrative practice. It has further eliminated the operation of California state law provided for in the Reclamation Act with respect to the

acquisition and use of project water by the Bureau, notwithstanding that the state's destiny is substantially influenced by how these waters are used.

Although the Ninth Circuit's decision necessarily applies only to the State of California, its holding rests primarily on a fundamental misinterpretation of Section 8 of the 1902 Act. That misinterpretation, applied to the other *amici* states, would eliminate any discretionary authority of the states to control the allocation of water stored at federal reclamation facilities. The *amici* thus urge this Court to grant the petition for writ of certiorari.

STATEMENT OF THE ISSUES

This case presents the question whether, under the Reclamation Act of 1902, the United States, acting through the Bureau of Reclamation (the "Bureau"), must obtain and comply with permits issued by the State of California, acting through its State Water Resources Control Board (the "State Board"), in instances where the Bureau seeks to acquire unappropriated water for reclamation purposes.

ARGUMENT

1. The Lower Court's Decision, in Exempting the Bureau of Reclamation from State Permit Systems, Alters Several Decades of Settled Administrative Practice.

The Bureau of Reclamation has consistently complied with the states' appropriation laws, including the permit systems on which those laws are based, since the passage of the Reclamation Act of 1902. Also, the Bureau has consistently acknowledged, since 1902, its obligation to comply with the states' appropriation laws. Therefore, the Ninth Circuit's decision alters several decades of settled administrative practice, and should be reviewed by this Court for that reason alone.

In 1956 hearings before the Subcommittee On Irrigation and Reclamation of the Senate, a representative of the Department of the Interior stated that the official position of Interior regarding the coverage and effect of Section 8, was that Section 8 completely controls the acquisition of water rights for the project. Hearings on S. 863 before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 84th Cong. 2d Sess. 101 (1956).

The Bureau has recognized its obligation to comply with state law in the acquisition of water rights in its internal regulations. Under the heading "Project Formulation" in the Bureau's "Instructions" dated July 16, 1959, it is asserted that:

> "Project plans must comply with state legal provisions or priorities for beneficial use of water, interstate water compacts, court decrees allocating water among states, water rights, and related matters." Instructions, § 116.3.3 (July 16, 1959).

Under the heading of "River Regulation," dated January 10, 1957, the Bureau advises that:

> ". . . the Reclamation Act recognizes the interests and rights of the states in the utilization and control of their water resources and requires that the Bureau, in carrying out provisions of the Act, proceed in conformity with state water laws. Since the construction of a reservoir and the subsequent storage and release of water for beneficial purposes normally entails stream regulation, it is necessary to reach an understanding with the state regarding reservoir operating limitations." Instructions, § 231.5.1 (January 10, 1957); *see* C. Wheatley & C. Corker, *Study of the Development, Management and Use of Water Resources on the Public Lands* 327-28 (1969).

As recently as October 10, 1975, after the trial court's decision, the Commissioner of Reclamation stated:

> "We recognize that the ultimate right to store, divert, and utilize water in accordance with applications made pursuant to state laws is one of the key elements of past, present, and future development in the West. Each state has the duty to determine under its own statutes how its unappropriated water is to be used. Since 1902, the Bureau has consistently taken the position that it will obtain under state law its rights to store and divert water for its projects recommended for Congressional authorization." Remarks by Gilbert G. Stamm to the California Water Resources Assn., San Francisco, California, Oct. 10, 1975.

Consistently with the above statements and instructions, the Bureau has in fact complied with state laws in the initiation of a project, even in those cases in which delay or inconvenience in implementing the project is the price of compliance. Thus, in one case the project was classified as detrimental to the public interest and the state permit was issued only after the federal government, through negotiations, modified its water right application. *See* Trelease, *Reclamation Water Rights,* 32 Rocky Mtn. L. Rev. 464, 466-69 (1960). Another case involved a Bureau plan to divert the water of a river contrary to the terms of a state statute and before implementing the project, the federal government agreed to provide a separate storage dam. *Id.*

On the other hand, in order to facilitate compliance with Section 8 requirements, a number of the Western States have made special provisions for the government appropriation of water which tend to facilitate appropriation. *Id.*

As the petition of the State of California points out, California has enjoyed 75 years of similarly successful accommodation between federal and state interests in the reclamation program. Nevertheless, the Ninth Circuit has

chosen to abrogate the state's role in California's reclamation projects. Therefore, the *amici* urge the Court to grant the petition for writ of certiorari, not in order to establish a new, untested federal-state relationship in California, but to continue this historic and successful partnership.

2. The Ninth Circuit's Decision Overturns That Which Congress Intended to Accomplish in 1902, and Re-Writes Federal Reclamation Law by Developing a New Water Doctrine Not Contemplated by Congress.

Because in vast areas of the West rainfall is slight and water is precious, public policy dictated a rule of law under which water rights could be lost by non-use and acquired only by beneficial use of water. Under the appropriation approach, the first to make a beneficial use of water is protected in that right to the extent of his use. What is a "beneficial use" is determined by the law of the state in which the use occurs. Thus the appropriation doctrine enables the state to prevent waste and mismanagement of its waters and, unlike the riparian doctrine, vests the state with broad control over its waters.

To help facilitate settlement of the West, Congress gave its approval to this water law practice. Thus, in the Mining Act of 1866, Congress confirmed vested rights for mining, agricultural, manufacturing and other purposes that were recognized by the local laws and customs, and approved the appropriative system as a method of obtaining future water rights. 14 Stat. 262 (1866), 43 U.S.C. § 661 (1970); *Atchison v. Peterson,* 87 U.S. (12 Wall.) 507 (1874); *Basey v. Gallagher,* 87 U.S. (12 Wall.) 670 (1874). The Desert Land Act of 1877 encouraged the settlement of irrigable lands by making large tracts available to those who would reclaim them. The Act declared that all non-navigable sources of water on the public domain were held free for appropriation. 19 Stat. 377 (1877), as amended, 43 U.S.C.

§ 322 (1970). It has been held that, by this Act, all these waters were severed from the land and reserved for the public under the laws of the states and territories. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

It was with this statutory background that the 1902 Reclamation Act was passed. As with the earlier Acts, western congressmen were again successful in securing in the federal enactment provisions which reserved to the states broad control over their water resources so that they could participate in the reclamation process in a very fundamental way. Thus, Section 8 of the 1902 Act provides:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . ." 32 Stat. 390 (1902), 43 U.S.C. § 383 (1970).

It is difficult to conceive of any other statutory language which could make clearer that the Bureau of Reclamation in developing water resources in the West is obliged to respect the state's regulatory authority in securing unappropriated water in the state for development of a particular project.

Furthermore, the legislative history of Section 8 removes any doubt that the Section was intended to require the Secretary to comply with state laws both in acquiring and distributing project water. Several senators and congressmen addressed themselves to this question during the 1902 congressional debates. Congressman Mondell of Wyoming,

the spokesman for the bill in the House of Representatives, responded at length to a question asking for clarification "upon the subject of national or state control." 35 Cong. Rec. 6677, 57th Cong., 1st Sess. (1902). He responded by quoting President Theodore Roosevelt for the proposition that "the distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws." *Ibid.* He stated that Section 8 merely followed traditional federal legislation "recogniz[ing] local laws and customs appertaining to the appropriation and distribution of water used in irrigation." *Id.* at 6679. The motto which he used to describe the scheme of the reclamation bill was "National Expenditure, Local Administration." *Id.* at 6677. Indeed, in all the legislative history of this hotly debated Act, no Senator or Congressman dissented from this construction of the Act. Further, no Senator or Congressman suggested the view that was the basis of the Ninth Circuit's decision.

The Ninth Circuit's decision inexplicably makes no reference to this extensive legislative history, or to the administrative practice of the Bureau of Reclamation in complying with the states' appropriation laws under Section 8. Instead, the court holds simply that Section 8 requires the Bureau to obtain a permit under state law, but not to comply with conditions in the permit. However, nothing in Section 8 supports any distinction between a permit and its conditions. The court stated that its conclusion is supported by the fact that California did not develop its permit system until after 1902. Slip Op., 4-5. If this is so, then on what basis does the court conclude that Section 8 requires the Bureau to comply with the "forms" of the states' permit procedures? If the Section is sufficiently clear to require the Bureau to obtain a permit under state law, it is sufficiently clear to require the Bureau to comply with conditions in the

permit. Thus, the court appears to have re-written the federal reclamation laws, and, as suggested in the concurring and dissenting opinion, to have developed a new "federal common law." Slip Op., Concurring and Dissenting Opinion, n. 2. If the federal reclamation laws are to be re-written, such is the task of Congress, not the courts. Certainly this Court should review any federal appellate decision which results in the development of a new water doctrine in an area as delicate and sensitive as federal and state relations over the appropriation and use of water.

3. In the Interests of Sound Public Policy, the Fundamental Accommodation of Federal and State Interests Achieved in the Reclamation Act of 1902 and Implemented With Success for Decades Should Not Be Discarded.

Decisions regarding the allocations of unappropriated water among competing demands have dramatic significance in the Western States. In determining where water will be diverted and used, a decision is directly made as to the locale of future growth and community development. In addition, by allocating an amount of unappropriated water to a selected beneficial use, the supply available for competing uses also within the state's legitimate concern is reduced. These decisions and determinations, although they will ultimately have import to some extent to the nation as a whole, have a significantly more profound effect on the development of the state, as they will shape the priorities for water uses between the state's farmers, cities and industries, and between these uses and competing environmental uses. Thus, determinations as to the use of water in the West involve a delicate and complex balancing of benefits and costs associated with each competing use of water and area of use. In exercising this responsibility, the states have developed elaborate administrative

machinery which insures that the public will be allowed to fully participate in appropriation hearings, and to provide information relating to competing water needs.

On the other hand, it is not realistic to assume that Congress has a comparable level of interest regarding water management affairs, unassociated with navigation, within an individual state. Nor is it realistic to assume that Congress has the time or expertise to involve itself in the details of state water management, even assuming an inclination to do so. Thus, Congress, in authorizing reclamation projects throughout the West, provides few specifics in the authorizing legislation with respect to eventual project design, capacity and schedule of water use.

Congress was undoubtedly influenced by these considerations of public policy in providing for state control of the acquisition, use and distribution of reclamation project water. The result was that the 1902 Reclamation Law set up a dual control, a partnership between nation and state. Under this accommodation, the federal government is to build and operate the reclamation projects, and the states are to control the acquisition and use of water for the projects, as well as its distribution. Thus, the states were provided a voice in the projects that the national government had to respect. Not coincidentally, both federal and state authorities have faithfully honored this accommodation ever since the Act's passage.

Of course, this is not to say that state laws may override Congressional objectives as expressed in Congress' reclamation laws. The Supreme Court has made it clear that the Supremacy Clause countenances no such interference. *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275 (1958); *City of Fresno v. California,* 372 U.S. 627 (1963). However, where state and federal laws do not conflict, state laws

should be allowed to operate. To do otherwise is to allocate exclusive decision-making power on water resources development to the federal government, despite the legislative history, judicial precedent, administrative construction and the plain meaning of the Reclamation Act itself. The fact that the project interferes with the state's own program for water development and conservation will be to no avail. The state will have no opportunity to have a voice in the project no matter what its effect. If the broad holding of the Ninth Circuit is upheld, even conditions imposed in permits by California in order to protect prior rights will at best be considered merely advisory. Such complete bureaucratic autonomy is the exact antithesis of the western system of property rights in water.

CONCLUSION

The Western States joined in this brief as *amici curiae* are deeply concerned about the Ninth Circuit's decision in this case. It sanctions in California a reversal by the Bureau of Reclamation of a policy of complying with state laws in the acquisition and use of project water, a policy which has been faithfully followed throughout the Western States for 75 years. This policy was the product of the simple observation by Congress that the states have systems of local water law adapted to local water supply, climate and demand. The Federal Government does not. Therefore, Congress established a partnership between the federal and state governments whereby the federal government was to build and operate reclamation projects and the states, within the limits described in this brief, were to control the acquisition and use of project waters. Of course, it is not suggested that conditions imposed by a state in a permit

issued to the Bureau of Reclamation for a reclamation project can either contradict an explicit provision or policy of federal law, or render a specific project useless. It is argued, however, that the states must have not only the power to determine the existence of unappropriated water, but also to give effect to provisions of state law, where appropriate, concerning the public interest, and to include in their determinations those conditions essential to the protection of existing rights. No court until now has sought to dissolve that congressionally established partnership. The clear dictates of Section 8 of the 1902 Reclamation Act and sound principles of public policy require that this partnership be continued. The *amici* urge therefore that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX (VOLUME I)

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 19, 1977
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Date		Filings—Proceedings
1973		
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11-17	5.	Fld no of mo for ord staying proceedings.
	6.	Fld no of mo for ord staying proceedings.
	7.	Fld no of mo for ord staying proceedings.
	8.	Fld no of mo for ord staying proceedings.
11-19	9.	Fld amend to complaint.
12-20	10.	Fld anser.
1974		
1- 2	11.	Fld memo of State of Cal in partial opp to & partial support of US mo to stay proceedings.
1- 7		Reg for mo to stay & consolidate, Ord briefs fld by Feb 19, & ord Feb 4 hrg on mo for summ judgmt reset to Mar 4, 74 at 2:00 PM.
3- 2		Ord case reset to May 14, 74 for fur proceedings.
3-16	12.	Fld status memo.
5-14		Ord case cont'd to Jun 11, 74 for fur proceedings.
6-11		Reg for hrg on motions, ord submitted on briefs & case cont'd to Jul 8, 74.
7- 8	13.	Fld munite ord re stayed proceedings.
7-13	14.	Fld notice of mo for sum jdgmt.
	15.	Fld no of mo on judgment on Pleadings.
	16.	Fld mo for sum jdgmt.
	17.	Fld mo for judgmt on pleadings.
	18.	Fld memo of po and auth in sup of mo for sum jdgmt and judmt on pleadings.
7-17	19.	Fld pltff interrog to deft.
8-13		Reg for mo for sum jdgmt and jdgmt on pleadings. Stip to Oct 22, 1974.
9-11	20.	Fld pltfs memo of po and auth in opp to defts mo for sum jdgmt and jdgmt on pleadings.
9-18		Reg defts mo for sum jdgmt and jdgmt on pleadings. Hearing reset from Oct. 22, 1974 to Nov. 19, 1974 at 10:00 A.M.
9-21	21.	Fld defts answers to pltfs interrog.
9-11	22.	Fld defts reply memo of po and auth.

Date		Filings—Proceedings
11-12	23.	Fld pltff supp memo of po and auth in opp to defts mo for sum jdgmt and jdgmt on pleadings.
11-13	24.	Fld notice and order on mo for sum jdgmt on pleadings be re-set to Nov. 25 and 26, 1974 at 10:00 A.M.
11-19	25.	Fld defts reply memo of po and auth.
11-25		Reg for defts mo for Sum Jdgmt and Jdgmt on pleading. Oral arg made by both parties and cont'd to Nov 26, 1974 for fur hearing.
11-26		Reg for Further hearing. Ord. case cont'd to Nov 27, 1974 for F/P.
11-27		Reg for Further hearing and completion of arg. Ord fur briefing as fol Ca. to open Jan 2, 1975; U.S. reply Feb. 2, 75; Ca to close Feb 24, 75. with the case taken under submission on Feb 24, 75. The transcript is to be available within 60 days. Cont'd to Feb 24, 75 for F/P.
12-30	26.	Fld memo of po and auth Amici Curiae in opp to mo of defts sum jdgmt.
1975		
1- 2	27.	Fld defts opening brief.
	28.	Fld memo of Kern Co. Water Agency as amicus curiae.
2- 7	29.	Fld pltfs opening brief after hearing on mo for sum jdgmt.
2-24		Ord cont'd to Apr 21, 1975 for F/P.
2-28	30.	Fld defts reply brief for sum jdgmt.
6-21		Ord cont'd to 6-30-75 for F/P.
6-30		Reg for F/P. Cont'd to 8-25-75.
6-25		Reg F/P. Cont'd to 10-20-75.
10- 9	31.	Fld opinion. Mo for sum jdgmt Denied. U.S. Mo Granted.
10-14	32.	Fld cert of serv by mail.
10-16	33.	Fld Judgment. Ent this day. Mld.
10-28	34.	Fld no of appeal.
	35.	Fld personal bond on appeal. $250.00 Cash. Mld notices.
11- 3	36.	Fld designation of record on appeal of Ca.
11- 5	37.	Fld pltfs X-designation of record on appeal.
11- 6	38.	Fld request to include proceedings in transcript had on 11-27-74.
11- 7	39.	Fld appellant's designation of record. (AG)

Date		Filings—Proceedings
12- 8	40.	Fld ord ext time to transmit record on appeal.
1- 7	41.	Fld ext for transmission of appeal to Feb. 26, 1976.
3-11	42.	Ord of 9th Cir directing clerk's transcript to be filed in that court by 3-23-76.

75-3554

DOCKET ENTRIES—9th CIRCUIT
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. S-3014
Judge Thomas MacBRIDE
of
filed 10-28-75
Fed. Rep. 2nd P 1239
D in DC: 10-15-73

IL DC Eastern California (Sacto)

United States of America,
Plaintiff-Appellee

vs.

State of California, State Water Resources Control Board, W. W. Adams, Chairman, Ronald B. Robie, Vice Chairman, Roy E. Dodson, et. al.,
Defendants-Appellants

For Appellant:
Richard Nichols,
Asst US Atty.

For Appellant:
Roderick Walston,
Deputy Atty Gen.

Date	Appellant's Account	Balance	Received	Disbursed
28	Deposit, 12 St. of Ca. Atty G. (53967)	50	50	
28	Treasurer U.S.	—	—	50

Date	Filings—Proceedings
1975	
Nov. 21	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. -acb-
Dec. 29	Filed Aplt's Motion for Ext. of Time to Transmit record and for filing of record on appeal. (to C) -acb-
1976	
Jan 6	Filed order (C) Record due 56 days date (Jan 2). ec
Mar 8	Filed Appellants' motion for order directing filing of record on appeal without inclusion of reporter's trans., or in the alternative for an order extending time for transmission of record on appeal and directing preparation of reporter's transcript by date certain. to "C" ec
Mar 10	Filed order (C) The clerk of the district court will cause the record to come forward within 14 days (of March 9, 1976) without the transcript. -dmf-

Date	Filings—Proceedings
1976	
Mar 17	Filed Appellants' motion (State of California, et al) for expedited hearing on appeal and for establishment of briefing schedule. to "C"
March 23	FILED CERT TRANSC RECORD ON APPEAL IN FOUR VOLUMES: VOLS. I-IV, PLDGS, THREE CERT COPIES. ONE BOX IN ROOM 208. -acb-
Mar. 23	Aplt's brief due May 2, 1976
Mar 29	Filed Appellee's (USA) motion for summary affirmance. 3/26 to Schickele (copy to "C") Filed Appellee's (USA) opposition to motion for expedited treatment, to "C") (copy to Schickele)
Mar 29	Filed order (C) Case will proceed on normal briefing schedule. When appellants opening brief is filed counsel may move to set the case. -dmf-
Mar 30	Filed Appellants' Reply to Opposition to Motion for expedited hearing on appeal. to "C" (copy to Schickele) ec
Apr 6	Filed Appellants' (State of Calif. & State Water Resources) to augment record and request to take judicial notice, affidavit of Richard C. Jacobs. 4/5 to Schickele. Filed Appellants' (State of Calif., et al) motion for leave to file oversized brief. to Schickele. Filed Appellants' (State of Calif., et al) motion for expedited hearing on appeal and to set appeal for argument. to Schickele
Apr 6	Rec'd 25 oversize Aplts' Briefs (State of California, et al) 4/5/76 -dmf- (two copies to Schickele)
Apr 6	Filed as of April 5th, order -C- "order of March 26, 1976 (filed in clerk's office 3-29-76) will stand. In reapplying the aplts will state that aple is opposed." cjb
Apr. 7	Filed Application of Dept. of Water Resources of the State of Calif. for permission to file Amicus Curiae Brief. (to Schickele)
Apr. 7	Rec'd 25 Amicus Curiae Brief. (Dept. of Water Resources of the State of Calif.) (2 copies to Schickele) -acb- 4-7-76
Apr 14	Rec'd from Atty. General, Calif. (appellant) letter dated Apr 12, 1976, re renewed motion to expedite (filed Apr 6/76), the motion should note that the appellee was opposed. to Schickele
Apr 20	Rec'd from aplt (Atty. Gen., Calif.) copy of letter asking to consider opening brief as opposition to motion for summary affirmance. to Schickele -dmf-

Date	Filings—Proceedings
1976	
Apr 21	Filed Motion of the City of Sacramento and Arcade County Water District for leave to file brief amicus curiae in support of appellants. 4/21 to Schickele w/copies of brief
Apr 21	Rec'd 25 Joint Amicus Curiae briefs (City of Sacramento and Arcade County Water District) 4/21/76 -dmf-
Apr. 26	FILED AS OF APRIL 20, 1976, CERT SUPPL RECORD ON APPEAL: ONE VOL OF RPTRS TRANSC, VOL. V, ORIG. & ONE COPY. RECORD NOW IN FIVE VOLUMES.
Apr 26	Filed order (C) permitting City of Sacramento and Arcade County Water District to file a joint Brief Amicus Curiae. Effective six days after date (April 24, 1976) if no objection filed meanwhile. -dmf-
May 3	Filed 25 Joint Amicus Curiae Briefs (City of Sacramento and Arcade County Water District) 4/21/76 -dmf-
May 6	Filed Appellee's motion (USA) for ext of time to file appellee' brief. to Schickele ec
May 10	Rec'd Notice of Withdrawal as Amicus Curiae of the State of South Dakota (no motion to appear as amicus was filed)
May 11	Rec'd from appellant (State of California) letter dated May 10, 1976, informing that they have no objection to the motion for extension of time for filing appellant's brief (filed May 6), but will oppose any further request for extension of time. to Schickele
May 13	Filed as of May 10, 1976, order (Hu, Cy) a) the motion for summary affirmance is denied; b) motion for expedited hearing is granted insofar as the clerk of the court is requested to schedule the case for oral argument in August or September, 1976; c) motion for leave to file an oversized brief is granted; d) motion to augment the record is denied and the request to take judicial notice is referred to the panel which hears the case; e) motion of the California State Water Resources Board for leave to file an amicus brief is granted. -dmf-

Date	Filings—Proceedings
1976	
May 13	Filed as of May 10, 1976, 25 Aplts' Briefs (State of California, et al) 4/5/76 -dmf-
May 13	Filed, as of May 10, 1976, 25 Amicus Curiae Briefs (California State Water Resources Board) 4/7/76 -dmf-
May 19	Rec'd from Atty. General letter dated May 18, 1976, re matters to be stricken from their brief.
May 26	Filed Motion for late filing of Amici Curiae Brief on behalf of the States of Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, etc. to "C" w/copy of brief.
May 26	Rec'd late 25 Amicus Curiae Briefs (States of Arizona, Colorado, et al) 5/26/76 -dmf-
May 27	Filed order (C) granting leave to file Amicus brief. Subject to reconsideration if any objection filed within 7 days. jr
May 27	Filed 25 Amicus Curiae Briefs (State of Arizona, Colorado, et al).
May 27	Filed, as of 5/26/76 order (W & S) upon due consideration, the motion for ext of time to file a brief is granted to and including June 21, 1976. jr
May 28	Filed Application of the Environmental Defense Fund, Inc., et al., for permission to file amicus curiae brief. to Schickele w/brief.
May 28	Rec'd 25 Amicus Curiae Briefs (Environmental Defense Fund, et al) 5/28/76 -dmf-
Jun 21	Filed aple's motion for ext of time to file brief. (to THE CLERK)
Jun 25	Filed and order (Clk) granting aplee (USA) an ext of time to file brief to and including June 25, 1976. -dmf-
June 28	Filed aple's motion for permission to file xeroxgraphic copy of brief pending repro. to "C" w/copy of brief. ec
June 30	Rec'd from Atty. Gen., California, letter dated June 29, 1976, advising that the State of Texas joins in the brief filed by State of Arizona, et al)
June 30	Filed as of June 24, 1976 order (Cy & Ky) upon due consideration, the application for permission to file an amicus curiae brief by the Environmental Defense Fund, Inc., the Natural Resources Defense Council, Inc., and the Sierra Club is granted and the brief heretofore received is ordered filed. jr

Date	Filings—Proceedings
1976	
Jul 2	Filed order (C) granting aplee (USA) leave to file xerographic copy of brief pending repro. -dmf-
July 6	Filed, as of June 24, 1976, 25 Amicus Curiae Briefs (Environmental Defense Fund, et al) 5/28/76 -dmf-
Jul 7	Filed, as of July 2, 1976, one xerographic copy aplee's brief (USA) 6/25/76 -dmf-
Jul 13	Filed Motion and Order (Clk) granting aplt an ext of time to file reply brief to and including July 19, 1976. -dmf-
Jul 16	Filed 25 Aplee's Briefs (7/2/76) -dmf-
Jul 20	Filed motion & order (Clk) extending time for filing aplts' reply brief to July 21, 1976. ec
Jul 21	Filed Appellants' motion (State of California, et al) for leave to file oversized brief. to Schickele ec
Jul 21	Rec'd 25 oversized Aplts' Reply Briefs (7/21/76) -dmf-
Jul 23	Filed Motion of Contra Costa County Water Agency for leave to file its brief as amicus in support of appellants. to panel w/brief
Jul 23	Rec'd 25 Amicus Curiae Briefs (Contra Costa County Water Agency) 7/23/76 -dmf- (panel)
Jul 29	Rec'd from Atty. Gen, Ca. letter dtd. Jul 28, 1976, indicating that aplt has no objection to the filing of Amicus brief (Contra Costa Water Agency) to panel ec
Aug 5	Filed order (Ca) It is hereby ordered that Contra Costa County Water Agency shall be permitted to file in the above-entitled appeal its brief as Amicus Curiae. -dmf-
Aug 5	Filed 25 Amicus Curiae Briefs (Contra Costa County Water Agency) 7/23/76 -dmf-
Aug 12	Filed order (H, T) Upon due consideration, the motion for leave to file an over length reply brief heretofore received is granted. -dmf-
Aug 12	Filed 25 Aplts' Reply Briefs (7/21/76) -dmf- (panel)
Sept 2	Rec'd from Atty. Gen., Calif., letter dtd. Sept 2, 1976, requesting that each side be given 45 minutes to argue. panel
Sept 3	Pursuant to instructions from the Court (via way of memorandum) counsel advised via telephone that the Court allot 45 minutes per side for oral argument. jc

Date	Filings—Proceedings
1976	
Sept 3	Atty general letter of 8/24/76 (submitted to panel 8/26/76) requesting add'l time for oral argument. (Letter recvd 8/26/76)
Sept. 7	ARGUED & SUBMITTED BEFORE: DUNIWAY, CARTER & WALLACE, CJJ
Sept 13	Rec'd from U.S. Dept. of Justice, Washington D.C., letter dtd. Sept 9, 1976, re add'l citation. panel ec
1977	
Jan 18	Filed aplts' (State of Calif., et al) motion to augment record on appeal by inclusion of newly discovered evidence. 1-17 panel
Jan 27	Filed Response (USA) to motion to augment record with newspaper clipping. panel ec
Feb 7	Received from aple (USA) letter dated 2/2/77 re case of *Israel v. Morton*. (panel) ec
Feb 9	Rec'd from aplt letter dated Feb 7, 1977, re case of *Israel v. Morton* and additional citations. (panel) -dmf-
Feb 22	Rec'd aplt's letter (State of Calif.) dated Feb 18, 1977. panel
Feb 28	Rec'd from aple (USA) letter dated Feb 25, 1977, in response to letter dated Feb 18, 1977 (State of Calif.) to panel ec
Apr 1	ORDERED OPINION *(DUNIWAY)* CARTER CONCURRING SPECIALLY; WALLACE CONCURRING & DISSENTING; FILED & JUDG TO BE FILED & ENTD
Apr 1	Filed opinion—The judgment is affirmed.
Apr 1	Filed & Entd Judgment. -fn-
Apr 1	Filed as of Mar. 31, order (D, CA, & WL) The motion to augment the record on appeal, rec'd by the clerk on Jan. 18, 1977 is granted, and the record is augmented accordingly. -fn-
Apr 5	Filed aplt's (State of Calif. et al) application for ext of time w/in which to file petition for rehearing. (D) ec
Apr 7	Filed order (D) Granting aplts' motion for an ext of time to and including April 29, 1977 in which to file a petition for rehearing. -fn-

Date	Filings—Proceedings
1977	
Apr 15	Filed Aplts' (State of Calif., et al) Petition for Rehearing. 4/15 panel
Apr 26	Clerk's letter advising that the court desires to have a response to the petition for rehearing, to be filed no later than May 9, 1977. -dmf-
May 3	Filed Aplts' (State of Calif., et al) motion to augment record on appeal by inclusion of newly discovered evidence. 5/3 panel
May 16	Rec'd Aplts' (State of Calif., et al) Reply to response to Petition for Rehearing. (Response to Petition not yet rec'd) to panel
May 17	Rec'd Aple's Response to Petition for Rehearing (late) 5/9 to panel
May 19	Filed motion (State of Calif., et al) for permission to file reply to response to petition for rehearing (panel) ec
May 20	Filed order (D, CA & WL) The motion of the aplts to augment the record on appeal by inclusion of newly discovered evidence, rec'd by the clerk on May 3, 1977, is denied.
May 26	Filed Aplts' (State of Calif., et al) motion to file response to petition for rehearing late. to panel ec
June 2	Filed order (D) State of Calif.'s motion for permission to file reply to response to petition for rehearing is granted.
June 2	Filed State of Calif.'s reply to response to petition for rehearing which was rec'd on May 16, 1977. -fn-
June 2	Filed order (D) Granting Aple's (UNITED STATES)'s motion to file response to petition for rehearing.
June 2	Filed (UNITED STATES)'s response to petition for rehearing, which was rec'd on May 17, 1977. -fn-
Aug 12	ORDERED OPINION (DUNIWAY) WALLACE CONCURRING IN PART; FILED & JUDG TO BE FILED & ENTD
Aug 12	Filed opinion—The petition for a rehearing is denied.
Aug 25	Received Supreme Court notice of filing petition for certiorari on Aug 19 '77, assigned no. 77-285. ogm

Original Filed Oct. 15, 1973
Clerk, U.S. District Court
Eastern District of California

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Attorneys for Plaintiff United States of America

In the United States District Court
for the Eastern District of California

No. Civ. S3014

The United States of America,
Plaintiff,

v.

The State of California, State Water Resources Control Board, W. W. Adams, Chairman, Ronald B. Robie, Vice Chairman, Roy E. Dodson, Jean Auer, And W. Don Maughan, as members of the State Water Resources Control Board,
Defendants.

COMPLAINT FOR DECLARATORY RELIEF

I
ACTION AND JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1345.

2. This is an action for a declaratory judgment pursuant to 28 U.S.C. Section 2201, for the purpose of determining a question of actual controversy between the parties as hereinafter set forth. [1]

II
PARTIES

3. Plaintiff, the United States of America, through its agency the Bureau of Reclamation of the Department of the Interior (hereinafter referred to as the "Bureau"), is engaged in the construction and operation of the Central Valley Project (hereinafter referred to as "CVP").

4. Defendants herein are the State of California; the State Water Resources Control Board, a public agency of the State of California created by the California Legislature pursuant to the provisions of West's Ann. Water Code, Section 174 *et seq.;* and that Board's five members, W. W. Adams, Ronald B. Robie, Roy E. Dodson, Jean Auer, and W. Don Maughan, who are appointed by the Governor of the State of California. The defendant Board is located in the City and County of Sacramento, California, and within the territorial jurisdiction of this Court. The Board is the successor to the duties, liabilities and responsibilities of the State Water Rights Board. West's Ann. Water Code, Section 179.

III
VENUE

5. Venue for this action properly lies in the United States District Court for the Eastern District of California

pursuant to 28 U.S.C. Section 1391(b), in that the plaintiff's claims arose in the Eastern District of California.

IV
THE CENTRAL VALLEY PROJECT

6. The Central Valley Project, a federal reclamation program, was designed to provide, among other things, [2] for the coordinated development of the Sacramento and San Joaquin Rivers and their tributaries through a system of physical works to regulate and distribute water supplies needed for agricultural, industrial and municipal development in the Central Valley of California. For extensive descriptions of the project see *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958), *United States v. Gerlach Live Stock Co.,* 339 U.S. 725 (1950), and *Dugan v. Rank,* 372 U.S. 609 (1963).

7. The Central Valley Project was authorized as an undertaking by the State of California in the enactment by the California Legislature of the Central Valley Project Act of 1933, Cal. Stats. 1933, Ch. 1042.

8. After the Central Valley Project Act of 1933 was passed, the State of California, failing in its efforts to finance such a giant undertaking, attempted to secure federal assistance. The CVP works were initially authorized as a federal project by the Rivers and Harbors Act of August 30, 1935, P.L. 74-409, 49 Stat. 1028, 1038, and some federal funds were made available for various features of the project in that year. On December 2, 1935, the President approved a report of the Secretary of the Interior, dated November 26, 1935, declaring the Central Valley Project to be feasible from engineering, agricultural, and financial standpoints, approving and recommending its construction as a federal reclamation project.

9. The 1936 session of Congress appropriated funds for continuation of the CVP, Act of June 22, 1936, P.L. 74-739, 49 Stat. 1597, 1622, and in 1937 Congress reauthorized the CVP as a federal reclamation undertaking in the Rivers and [3] Harbors Act of August 26, 1937, P.L. 75-392, 50 Stat. 844, 850.

10. The Rivers and Harbors Act of 1937, P.L. 75-392, 50 Stat. 844, 850, Section 2 provides in part as follows:

> . . . , That the entire Central Valley project, California, . . . , is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes. . . .

11. Construction of the Central Valley Project was begun in 1937 and the initial units of the CVP were first placed in full, coordinated operation in 1951.

12. Over the years the Bureau of Reclamation has filed applications with the State Water Resources Control Board or its predecessors for water uses necessary for various aspects of the CVP. Such filings have been made in the interest of comity with the State of California, but are not required as a matter of federal reclamation law.

13. As water use increased in the Central Valley, it was evident that more units would be necessary to accomplish all of the purposes for which the CVP was envisaged. Accordingly, Congress has continued to authorize additional units and has appropriated additional funds for the Central [4] Valley Project.

V

THE NEW MELONES PROJECT

14. The New Melones Project was authorized as one of the units of the CVP by the Flood Control Act of December 22, 1944, P.L. 78-534, 58 Stat. 88. The project was reauthorized by the Flood Control Act of October 23, 1962, P.L. 87-874, 76 Stat. 1180, 1191, which substantially modified the Project in accordance with House Document 453, 87th Congress, First Session. That Act reads in part as follows:

> . . . That upon completion of construction of the dam and powerplant by the Corps of Engineers, the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws, except that the flood control operation of the project shall be in accordance with the rules and regulations prescribed by the Secretary of the Army: . . . *Provided further,* That before initiating any diversions of water from the Stanislaus River Basin in connection with the operation of the Central Valley project, the Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin and the diversions shall at all times be subordinate to the quantities so determined: . . . *Provided further,* That contracts for the sale and delivery of the additional electric energy available from the Central Valley project power system as a result of the construction of the

plants herein authorized and their integration with that system shall be made in accordance with preferences expressed in the Federal reclamation laws . . . *And provided further*, That the Secretary of the Army give consideration during the preconstruction planning for the New Melones project to the advisability of including storage for the regulation of streamflow for the purpose of downstream water quality control. [Emphasis added.]

15. The Congressionally approved New Melones Project provides for a dam on the Stanislaus River, about [5] thirty-five miles northeast of Modesto, California, to create a reservoir with a gross storage capacity of about 2,400,000 acre-feet for flood control, irrigation, municipal, industrial, domestic, power, recreation, water quality control, and fish and wildlife purposes.

16. The New Melones Project provides for construction of a 300,000 kw capacity hydroelectric powerplant immediately below the dam. The Project will also provide flood protection to about 35,000 acres of highly developed agricultural land in the flood plain of the Stanislaus River and to suburban areas. When completed the New Melones Project will develop a presently estimated conservation yield of 285,000 acre-feet annually including up to 70,000 acre-feet for water quality in any one year. This yield will provide a new irrigation supply for diversion to the local service areas or for export to other areas in the Central Valley needing water; provide urgently needed power; provide recreational opportunities and insure the preservation and propagation of fish and wildlife; and provide water quality control along the Stanislaus, the lower San Joaquin River and in the Delta.

17. The United States, through the Bureau of Reclamation, sought to obtain permits to appropriate unappropriated water from the Stanislaus River for development of the New Melones Project, and in this regard, filed Applications 19303 and 19304 and sought as well the assignment of Applications 14858 and 14859. The defendant, on April 4, 1973, rendered Decision 1422 which ruled on these applications. A copy of that decision is attached hereto and made a part hereof.

18. In Decision 1422, the Board specifically found [6] that "[t]here is unappropriated water available to satisfy the demands of the project as proposed." (D-1422 at 26) The Board then ordered that Applications 14858 and 14859 be transferred to the Bureau of Reclamation, and further ordered that permits to appropriate be issued on these applications as well as on Applications 19303 and 19304. (D-1422 at 28)

19. The Board, however, attached numerous conditions and limitations to these permits. (D-1422 at 29-37) Such limitations and conditions interfere with and affect the operation of the Project as authorized by Congress. By way of example:

1.) Decision 1422 gives a preference to the use of the Stanislaus River above the New Melones Dam for boating and rafting uses over the power, lake recreation, fishery, and water conservation uses provided for in Congressional Acts authorizing the New Melones Project. The area above New Melones Dam on which boating and rafting is done consists to a large extent of federal lands withdrawn by the United States for power and reclamation purposes.

2.) Because the Board decided in Decision 1422 that water was not then needed for irrigation and domestic use, it prohibited storage of water in the New Melones Reservoir except for those quantities necessary to provide flows in the Stanislaus River below the New Melones Dam for the preservation and [7] enhancement of fish and wildlife and for the maintenance of water quality. Storage of water for irrigation uses envisioned by the New Melones Project would only be permitted after a satisfactory demonstration to the Board of the need for the water.

3.) Decision 1422 forbids the use of water conserved by the New Melones Reservoir in areas that could be served by other Central Valley Project sources. This limitation is contrary to the Congressional authorization which requires that the New Melones Project be operationally and financially integrated with the Central Valley Project. Decision 1422 also would require the United States to undertake studies, investigations, and measurements that have not been authorized and to submit its operating criteria to the State Water Resources Control Board for approval.

4.) The New Melones Reservoir was planned and authorized to take full advantage of power generation developed from water released from the reservoir for flood control, conservation, water quality control, and fish and wildlife management. To develop the full potential of project water for power generation as authorized by Congress, it is essential that a minimum

pool be established in the reservoir to provide sufficient head for operation of a powerplant Decision 1422 forbids the [8] maintenance of such a minimum power and recreation pool.

WHEREFORE, the plaintiff United States of America requests this Honorable Court to:

(1) Enter judgment declaring that the United States of America can appropriate unappropriated waters necessary for use in any federal reclamation project within the State of California, without the necessity of applying to the California State Water Resources Control Board;

(2) Enter judgment declaring that when the United States of America chooses as a matter of comity to submit applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available;

(3) Enter judgment declaring that when the United States chooses as a matter of comity to submit applications to the California State Water Resources Control Board, that that Board cannot impose any terms or conditions in permits issued pursuant to such applications in contravention of federal law;

(4) Enter judgment declaring that Decision 1422 of the California State Water Resources Control Board is void in all respects where that decision conflicts with or contravenes federal law;

(5) Enter an order charging defendants with the costs of this suit; and

(6) Enter an order for such other and further relief as the Court deems proper.

Respectfully submitted,

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United States Attorney[9]

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Washington, D. C. 20530

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Attorneys for Plaintiff[10]

(Title Omitted in Printing)

AMENDMENT TO COMPLAINT
Filed Dec. 19, 1973
Clerk, U. S. District Court
Eastern District of California

Comes now plaintiff UNITED STATES OF AMERICA, by and through its undersigned attorneys, and pursuant to the provisions of Rule 15(a) of the Federal Rules of Civil Procedure does hereby amend its complaint in the above entitled action by deleting therefrom paragraphs (3) and (4) of the prayer as therein set forth at page 9, lines 15 through 24 of plaintiff's complaint, and by substituting in the place and stead thereof the following paragraphs:

"(3) Enter judgment declaring that when the United States chooses as a matter of comity to submit applications to the California State Water Resources Control Board, that that Board cannot impose any terms or conditions in permits issued pursuant to such applications in contravention of federal law, or which are not specifically authorized and required by federal law, federal regulation or federal administrative directive;

(4) Enter judgment declaring that Decision 1422 of the California State Water Resources Control Board is void in all respects where that decision conflicts with or contravenes federal law, or requires action not specifically authorized and required by federal law, federal regulation or federal administrative directive;".

DATED: December 19, 1973

DWAYNE KEYES
United States Attorney

By: RICHARD W. NICHOLS
Assistant U.S. Attorney

ORIGINAL FILED
DEC 26 1973
CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

ANSWER TO COMPLAINT

The defendants answer the complaint herein as follows:

1. With respect to the 1st through the 11th paragraphs of the complaint, the defendants admit said allegations.

2. With respect to the 12th paragraph in the complaint, the defendants admit the first sentence thereof, and deny the second sentence thereof.

3. With respect to the 13th through the 15th paragraph of the complaint, the defendants admit said allegations.

4. With respect to the 16th paragraph in the complaint, the defendants admit the first three sentences thereof, and deny the fourth sentence thereof (commencing with the words "This yield" at line 14, and ending with the words "in the Delta" on line 21).

5. With respect to the 17th paragraph of the complaint, [101] the defendants admit said allegations.

6. With respect to the 18th paragraph of the complaint, the defendants deny the first sentence thereof, and admit the second sentence thereof. The Board found that unappropriated water was only available to be collected to storage from November 1 to June 30th of the succeeding year in each year, and found that there was no unappropriated water available during the month of July, August, September and October.

7. With respect to the 19th paragraph in the complaint, the defendants admit the first sentence thereof, and deny the second sentence thereof.

8. With respect to subparagraph 1) of paragraph 19 in the complaint, the defendants deny the first sentence thereof and admit the second sentence thereof. The defendants allege that Decision 1422 states, at page 18, that, "[w]hile stream fishing downstream from the reservoir would be enhanced, it would be practically eliminated in the area to be inundated, together with other stream-related activities and wildlife habitat," and, on page 21, that "any permit issued pursuant to Applications 14858 and 19304 should contain terms requiring releases of up to 98,000 acre-feet annually for maintenance of fish and wildlife as planned by the Bureau."

9. With respect to subparagraph 2) of the 19th paragraph in the complaint, the defendants admit said allegations.

10. With respect to subparagraph 3) of paragraph 19 of the complaint, the defendants deny said allegations. Decision 1422 states, at page 19, that because of the lack of showing of need for water for the project outside the counties of Calaveras, Tuolumne, Stanislaus and San Joaquin, the permits should restrict the place of use of water for consumptive purposes to those counties, but should provide that a petition to include other [102] specific areas will be considered by the Board upon a showing that water from other Central Valley project sources is not available to serve such areas. Furthermore, Decision 1422 states, at page 30, that the Bureau shall submit its operations schedule to the Board for approval.

11. With respect to the allegations in subparagraph 4) of the 19th paragraph of the complaint, the defendants deny the allegations therein on lack of information and belief.

12. The defendants allege that the plaintiff United States is required to comply with all terms and conditions imposed by the defendants on permits issued to the U. S. Bureau of Reclamation to appropriate water for reclamation purposes in California, pursuant to the federal reclamation laws, including but not limited to section 8 of the Reclamation Act of 1902. See 32 Stat. 390.

13. The defendants allege that the plaintiff United States is required to comply with all terms and conditions imposed by the defendants on permits issued to the U. S. Bureau of Reclamation to appropriate water for reclamation purposes in California, pursuant to recent environmental legislation passed by Congress, including but not limited to the National Environmental Policy Act (83 Stat. 852).

14. The defendants allege that the United States, by accepting assignments for permit applications and by submitting its own permit applications, has agreed to comply with California law in appropriating water for the Central Valley Project, and the defendants further allege that the plaintiff United States has accepted the benefits of the permits issued by the defendants since 1938, and the defendants therefore allege that the plaintiff United States should be estopped from denying the truthfulness of the allegations in paragraphs 12 and 13 above. [103]

15. The defendants allege that, if the plaintiff United States prevails in its position that it is not required to comply with terms and conditions imposed on permits issued by the defendants, plaintiff United States and the U. S. Bureau of Reclamation are required to surrender any and all permits previously received by the defendants, and to withdraw any and all applications previously submitted to the defendants.

16. The defendants allege that the plaintiff United States failed to file a mandamus action, or any other kind of action, in the courts of California, or any other court, to seek judicial review of D 1422 within the time required by California law, and pursuant to the provisions of California law. Defendants therefore allege that, under California law, the assertion of plaintiff United States concerning the alleged invalidity of D 1422 is bared by the doctrine of res judicata, and that this court is accordingly without jurisdiction to consider said assertions. The defendants further allege that, for the reasons set forth in this paragraph, the plaintiff United States is estopped from denying the validity of D 1422.

17. The defendants allege that any further consideration of the issues in this matter should be stayed pending resolution of the issues raised in *State of California v. Morton*, S 2924, or in the alternative that the two matters should be consolidated.

WHEREFORE, the defendants State of California, State Water Resources Control Board, et al. request this honorable Court to:

(1) Deny the relief sought by plaintiff United States;

(2) Enter judgment declaring that plaintiff United States and the U. S. Bureau of Reclamation are required to comply with conditions imposed in permits issued by the State Water [104] Resources Control Board, which permits authorize said Bureau to appropriate water for use in the Central Valley Project in California;

(3) Enter judgment declaring that Decision 1422 of the State Water Resources Control Board does not conflict with or contravene federal law, and that plaintiff United States and the U. S. Bureau of Reclamation are required to comply with all terms and conditions therein;

(4) Enter judgment declaring that the United States is estopped from denying the validity of D 1422, and estopped from denying its obligation to comply with all terms and conditions therein;

(5) Enter judgment requiring the plaintiff United States and the U. S. Bureau of Reclamation to surrender any permits previously issued by the defendants, in the event that the court grants the relief sought by the plaintiff United States;

(6) Issue an order declaring that this court is without jurisdiction to consider the merits of the action herein;

(7) Stay any further consideration of the matter herein pending resolution of the issues in *State of California v. Morton*, S 2924 (E.D. Cal.), or in the alternative to consolidate that proceeding with this proceeding.

(8) Grant the defendants their costs of suit herein; and

(9) Grant such other relief as the Court deems proper.

DATED: December 21, 1973.

EVELLE J. YOUNGER, Attorney General
CARL BORONKAY,
Assistant Attorney General

RODERICK WALSTON,
Roderick Walston
Deputy Attorney General
Attorneys for Defendants [105]

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO } ss.

ALICE MAZZA, being first duly sworn, deposes and says:

I am a citizen of the United States, over the age of 18 years, and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102; I served a copy of the attached Answer to Complaint on the following by placing same in an envelope addressed as follows:

Hon. Dwayne Keyes
United States Attorney
650 Capitol Mall, Room 2058
Sacramento, CA 95814

Attention: Hon. Richard W. Nichols
Assistant U. S. Attorney

Said envelope was then, on December 21, 1973, sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

ALICE MAZZA

Subscribed and sworn to before me,
this 21st day of December, 1973.

FLORENCE E. CROZIER
Notary Public

in and for the City and County of
San Francisco, State of California.

UNITED STATES of America,
Plaintiff-Appellee,

v.

The STATE OF CALIFORNIA, State Water Resources Control Board, W. W. Adams, Chairman, Ronald B. Robie, Vice Chairman, Roy E. Dodson, Jean Auer, and W. Don Maughan, as members of the State Water Resources Control Board, Defendants-Appellants.

No. 75-3554.

United States Court of Appeals,
Ninth Circuit.

April 1, 1977.

Rehearing Denied Aug. 12, 1977. [1347]

Evelle J. Younger, Atty. Gen., Carl Boronkay, Asst. Atty. Gen., Roderick E. Walston, argued, and Richard C. Jacobs, Deputy Attys. Gen., San Francisco, Cal., for defendants-appellants.

Carl Strass, Atty., argued, Land & Natural Resources Div., Dept. of Justice, Washington, D. C., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before DUNIWAY, CARTER and WALLACE, Circuit Judges.

DUNIWAY, Circuit Judge:

The State of California and its State Water Resources Control Board appeal from judgment for the United States entered by the District Court for the Eastern District of California. The opinion and judgment of that court was

reported in *United States v. State of California,* E.D. Cal., 1975, 403 F.Supp. 874. The judgment of the district court appears at 403 F.Supp. 902-03. The principal questions are (1) whether Section 8 of the Reclamation Act of 1902, 32 Stat. 388, now 43 U.S.C. § 383, requires that the United States apply to the California State Water Resources Control Board for a permit to appropriate unappropriated water from the Stanislaus River for the New Melones project, and, (2) if so, what conditions, if any, the Board can attach to a permit that it grants. The questions are of great importance, and we have given them careful attention. [1348]

[1] Our study of the record and the law convinces us that the judgment must be affirmed, substantially for the reasons stated by Judge MacBride in his opinion.

Two recent decisions of the Supreme Court strengthen our conviction. In *Hancock v. Train,* 1976, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555, the question was whether § 118 of the Clean Air Act, 42 U.S.C. § 1857f, permits a state to require federally owned or operated installations to obtain a permit to operate, as required by the state's federally approved plan for assuring air quality. The pertinent language of § 118 reads:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.
> 42 U.S.C. § 1857f.

The Court states its holding as follows:

> Kentucky, like the Court of Appeals for the Fifth Circuit in *Alabama v. Seeber*, 502 F.2d 1238, 1247-1248 (1974), finds in §§ 118 a sufficient congressional authorization to the States, not only to establish the amount of pollutants a federal installation may discharge, but also to condition operation of federal installations on securing a state permit. We disagree because we are not convinced that Congress intended to subject federal agencies to state permits. We are unable to find in § 118, on its face or in relation to the Clean Air Act as a whole, or to derive from the legislative history of the Amendments any clear and unambiguous declaration by the Congress that federal installations may not perform their activities unless a state official issues a permit. Nor can congressional intention to submit federal activity to state control be implied from the claim that under Kentucky's EPA-approved implementation plan it is only through the permit system that compliance schedules and other requirements may be administratively enforced against federal installations. *Id.* at 180-81, 96 S.Ct. at 2013.
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>
> In view of the undoubted congressional awareness of the requirement of clear language to bind the United States, our conclusion is that with respect to subjecting federal installations to state permit requirements, the Clean Air Act does not satisfy the traditional requirement that such intention be evinced with satisfactory clarity. Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest. *Id.* at 198, 96 S.Ct. at 2021.22 (footnotes omitted).

In *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 1976, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578, the Court reached a similar conclusion as to the effect of § 313 of the Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1323. That section provides that federal installations must "comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements." California and Washington sought to apply the permit requirements of their programs. We held that they could do so (511 F.2d 963), but the Supreme Court reversed. Applying the principles of *Hancock, supra,* the Court said:

> Our decision in this case is governed by the same fundamental principles applied today in *Hancock v. Train, ante,* [426 U.S.] at 179 [,96 S.Ct. 2006, 48 L.Ed. 2d 555]: federal installations are subject to state regulation only when and to the extent that congressional authorization is [1349] clear and unambiguous. *Id.* at 211, 96 S.Ct. at 2028.
>
> Except for the reference to service charges, § 313 is virtually identical to § 118 of the Clean Air Act, 42 U.S.C. § 1857f. Taken alone, § 313, like § 118 of the Clean Air Act, states only to what extent—the same as any person—federal installations must comply with applicable state requirements. Section 313 does not expressly provide that federal dischargers must obtain state NPDES permits. Nor does § 313 or any other section of the Amendments expressly state that obtaining a state NPDES permit is a "requirement respecting control or abatement of pollution." *Id.* at 212-13, 96 S.Ct. at 2028 (footnotes omitted).

The language of § 8 of the Reclamation Act of 1902, set out in the opinion of the district court, 403 F.Supp. 885, is no more specific in subjecting federal projects to state permit requirements than are the statutes construed in the foregoing cases. Our view that the judgment in this case

should be affirmed is, we think, supported by the principles applied in those cases. Indeed, we find that California's claim in this case that the United States must obtain a permit and comply with conditions embodied in it is less supportable than the claims of Kentucky in *Hancock, supra,* and of California and Washington in *Environmental Protection Agency, supra.* In each of those cases, it could more plausibly be argued that Congress did intend to subject federal installations to state permit requirements than in this case. When the Congress enacted § 118 of the Clean Air Act and § 313 of the Water Pollution Control Act Amendments of 1972, the use by the state of the permit device as a means of enforcing their laws in these areas was well known. The language of the two acts, subjecting federal instrumentalities to state laws, is very broad. Yet the Court declined to read either section as requiring compliance with state permit requirements.

On the other hand, when § 8 of the Reclamation Act was adopted in 1902, California's permit requirement did not exist. At that time, under the Civil Code of 1872, §§ 1410-1422, surplus water was appropriated by the physical act of taking and diverting it to beneficial use. An appropriator could post a notice of taking at the point of diversion and record a copy with the county recorder. If the appropriator was diligent in completing the work for the diversion, his rights would date back to the posting of the notice. The statute did not create appropriative rights; it merely provided evidence of the date of appropriation. A *fortiori,* then, we cannot read § 8 as requiring compliance with California permit requirements that did not exist when § 8 was adopted.

In 1913, California enacted the Water Commission Act (Cal.Stats.1913, c. 586) which created the State Water

Commission and provided a statutory procedure that could be followed in the appropriation of unappropriated water flowing in any natural channel "for useful and beneficial purposes." The Act became effective, following a referendum vote, in 1914. In 1923, an amendment made the statutory procedure the exclusive method of appropriating water. (Cal.Stats.1923, c. 87.) The Act, as amended, is now part of the California Water Code, Divisions 1 and 2.

[2] As the district judge concluded, a major purpose of § 8 of the 1902 Act was to recognize and protect state water law, particularly the state law doctrine of appropriative rights to water. 403 F.Supp. at 888. Similarly, the Clean Air Act and the Water Pollution Control Act amendments give effect to state law and require compliance with it by federal installations. Indeed, those acts are more specific than § 8 of the 1902 Act. Yet the Court has declined to read them as subjecting federal installations to state permit requirements, even though the use of permits by the states as a means of enforcing their clean air and water pollution laws was known. To read [1350] § 8 of the 1902 Act as requiring compliance with laws that did not then exist and procedures not made compulsory by California until 1923—over 20 years later—would fly in the face of the *Hancock* and *Environmental Protection Agency* decisions. We could only do so if the language of § 8 were much more specific than it is.

[3, 4] In one respect, however, we disagree with Judge MacBride's decision. He says, 403 F.Supp. 889-90:

> Indeed, while the Congressional history of the 1902 Act indicates broad federal purpose and authority in the operation and control of federal reclamation projects, the comity inherent in a federal system would not permit an overbroad usurpation of state sovereignty. Accordingly, the federal government is required, when acquiring water for federal reclamation projects, to

comply with the forms of state law, including application to state water boards where necessary, for two purposes: (1) to enable the state to determine, according to its law, whether there is sufficient unappropriated water available for the project; and (2) to give notice to the state of the scope of the project.

His judgment provides:

(1) The United States can appropriate unappropriated water necessary for use in any federal reclamation project within the State of California, but must first, in accordance with comity, apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water.

(2) When the United States submits applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available.

We agree with this result, but we do not agree that the requirement is one of comity. It is legal requirement of § 8.

Under § 8, the national government, in constructing and administering reclamation projects, must recognize and cannot nullify either water rights created by state laws or the laws that create them. But enforcement of the government's duty via the permit device is not handed over to the state.

The phrase "in accordance with comity" is stricken from paragraph (1) of the judgment. In all other respects, the judgment is affirmed.

JAMES M. CARTER, Circuit Judge, concurring specially:

I concur in the above opinion. *Hancock v. Train,* 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976), and *Environmental Protection Agency v. California ex rel. State Water Resources Control Board,* 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976), make improper, under existing statutes, any state requirements in the nature of permits. The cases hold that is is for the Congress to explicitly determine whether to subject federal agencies to state permits.

I would suggest, however, that it may be one thing for the Congress to provide that a state may require a permit to assure proper air or water quality standards of a federally-owned or operated installation; it is quite another thing to permit a state to require permits for the very operation of such a facility. I cannot envision the Congress providing that the states, by a permit process, may control the operation of federally constructed, funded, and operated water and power projects.

WALLACE, Circuit Judge, concurring and dissenting:

Although recent Supreme Court decisions leave me with no clear concept of what Congress must say in order to require the federal government to comply with state law, I am persuaded that the language of the statute reviewed here is insufficient to validate California's permit procedure. While the "shall" in section 8 of the 1902 [1351] Reclamation Act appears to be mandatory, and while the Bureau of Reclamation's conduct over nearly three-quarters of a century indicates that it had no doubt of the necessity for compliance with state law, I cannot say that the language of the section is any clearer or less equivocal than that rejected as insufficient in *Hancock v. Train,* 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976), and *EPA v. California ex rel. State Water Resources Control Board,* 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976). Thus, with reluctance I concur that the statute does not require the Bureau of Reclamation to secure, pursuant to state law, the permit in question.

However, unlike the majority,[1] I would go no further. Nothing in *Hancock* or *EPA* necessarily forecloses federal compliance with state-imposed requirements not involving permits. Indeed, the more than 70 years of cooperative development of water resources in the West under the Reclamation Act attest to the wisdom in providing non-exclusive control over this limited asset.

Also, I believe that we must disapprove that portion of the district court's order that requires the federal government, "in accordance with comity, [to] apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water" and that requires the Board to "grant such applications if unappropriated waters are available." *United States v. State of California, supra*, 403 F.Supp. at 902. By construing section 8 under compulsion of *Hancock* and EPA as not requiring Bureau of Reclamation compliance with state appropriation procedures, we bring an element of uncertainty to the administration of water resources. Absent some mechanism to convey the information, the states cannot know what amount of unappropriated water remains for private use in a watershed after a portion is appropriated by the Bureau. The "comity" theory and

1. The majority's approach to the permit issue seems to be premised on the belief that the impermissible aspect of the state's scheme is not the permit requirement but rather the *conditions* the state has attached to the permit. California has conceded all along that, although the Bureau must seek and secure a permit, the state has no power to attach to the permit conditions inconsistent with or contradictory to congressional purposes underlying the particular reclamation project. California believes, however, that no such conflict exists in this case.

In a proceeding before a state agency, it was determined that the conditions imposed by California were valid. The federal government did not appeal this decision. Accordingly, the government conceded at oral argument that it is precluded by the doctrine of res judicata from raising the issue anew in this case.

application/notice requirement of the district court are an effort to patch this tear caused by the new construction of section 8.

It is a wayward effort. Comity is a concept of deference and voluntary action. *Zink v. Estelle*, 403 F.Supp. 656, 659 (S.D.Tex.1975); *Galloway v. Watts*, 395 F.Supp. 729, 731 (D.Md.1975). To use such a concept as a basis for *requiring* affirmative federal action seems peculiarly incongruous. Accordingly, I agree with the majority's disapproval of the district court's comity theory.

But the majority does no better in its effort for it provides no defensible basis for requiring federal agency action. Accordingly, I must reject that portion of the majority's opinion which directs the federal government "to comply with the *forms* of state law" (emphasis added) because "[i]t is a legal requirement of § 8." Majority op. at 1243.[2]

Concededly where two sovereigns, acting independently, administer water rights in the same watershed, there is a great poten- [1352] tial for uncertainty. But that is what our *Hancock*- and *EPA*-inspired construction of section 8 means. The majority has failed to find a defensible legal

2. While the majority fails to provide us with any legal reasoning for requiring compliance with "the forms of state law," I can only assume that the requirement is derived from federal common law. Before embarking on this new and unchartered course of constructing common law, I would ask: Do we have the legal competency to fashion any rules in this area? Even if we do, is it wise for us to undertake the task? While I entertain doubts that the first question can be answered affirmatively, I am convinced that we ought not undertake the task of judicial rulemaking in an area as complex and sensitive as state-federal relation over water.

If my assumption regarding the federal character of the application/notice requirement is incorrect, then that requirement must be viewed as one of state law. If derived from state law, there would be an inconsisteney with the majority's initial conclusion that section 8 does not require federal agency compliance with state permit procedures.

basis to give effect to its desire to avoid this problem. Unfortunately, I can see no such basis either. Accordingly, we have, I believe, no alternative but to leave it to the legislative branch to devise a solution. Therefore, I would go no further than to disapprove the permit procedure in question.

On Petition for Rehearing

In its petition for a rehearing, California relies upon an argument that it made, but did not emphasize, in its briefs on appeal, an argument that we overlooked. It points to the fact that certain of the permits involved in this case had their origin in two applications filed by the State Department of Finance. These applications were then assigned by the Department to the Bureau of Reclamation. The State points out that its Department of Finance, had it prosecuted the applications to the obtaining of permits, would certainly have been bound by whatever conditions the State Board might impose. It follows, says the State, that the Bureau, assignee, is also subject to those conditions because, as assignee, it could acquire no greater rights than its assignor. The argument is superficially appealing, but, on reflection, we reject it.

The argument overlooks two considerations. The first is that the assignment was of an application, not of a permit containing conditions. The second is that the assignee was the Bureau, a Federal agency exercising powers conferred upon it by the Congress of the United States, whose valid enactments are "the supreme Law of the Land" (U.S. Const. Art. VI, cl. 2).

[5] Under California law, an application for a permit to appropriate surplus or unappropriated water confers nothing upon the applicant as against the state; all that it

confers is a priority over later applicants if the application is granted. Cal.Water Code § 1450 states:

> Any application properly made gives to the applicant a priority of right as of the date of the application until such application is approved or rejected. Such priority continues only so long as the provisions of law and the rules and regulations of the board are followed by the applicant.

Cal.Water Code § 1455 then adds: "The issuance of a permit continues in effect the priority of right as of the date of the application. . . ."

[6] The Supreme Court of California interpreted these provisions in *Madera Irrigation District v. All Persons*, 1957, 47 Cal.2d 681, 690, 306 P.2d 886, 891 *rev'd* on other grounds, *Ivanhoe Irrigation District v. McCracken*, 1958, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313. There the court stated:

> The filing of an application under the present law is comparable and of like effect to the posting and recording of notice or commencement of actual construction work under the rules which had previously prevailed. . . . The Water Code provides that the effect of filing an application confers, for all practical purposes, a priority only.

To the same effect, see *United States v. Fallbrook Public Utility District*, S.D.Cal., 1958, 165 F.Supp. 806, where Judge James M. Carter stated (at 855):

> Until the application to appropriate is acted upon by the State Water Rights Board favorably to the applicant, and the issuance of a permit is directed, the applicant has no property right of any kind as against the state. He has an inchoate, [1353] incipient, conditional right of procedural priority over later applicants. . . .

That is all that the State Department of Finance had, and all that it could assign to the Bureau.

When the Bureau became the assignee of that "inchoate, incipient, conditional right," it was acting in the same capacity as when it filed its own applications. It was acting under the same Federal laws, and, absent those laws, it would have had no right to appropriate any water. Its substantive rights arose from the Congressional legislation, not from the assignment. There is no contention that the assignment was expressly conditioned upon acceptance of whatever permit conditions the State might impose. On the contrary, the State's briefs make it clear that the State Department of Finance filed the applications for one purpose only, to obtain, not for itself, but for the Bureau when the project finally went forward, a priority date as appropriator.[1]

---

1. Originally, the Central Valley Project, of which New Melones is a part, was to be constructed and operated by the State. Therefore, as California told us in its opening brief, its Department of Finance began in 1927 filing applications for permits to appropriate water for the Central Valley Project,

> so that the State—in anticipation of State construction of the CVP—could obtain a prior right to the use of water, as against private appropriators who submitted later applications; . . . .
> (Brief, page 5)
> As noted earlier, Decision 1422 approved the assignment of two applications to the Bureau, and issued permits to the Bureau on the basis of these applications; these applications had originally been filed by a State agency for the purpose of obtaining an early priority date.
> (Brief, pages 83-84)

There is a similar assertion in California's Reply to Response to Petition for Rehearing, page 6:

> [T]he State Department of Finance, in applying for water rights in 1927, did not apply for the purpose of ultimately encumbering the Bureau's water rights. Rather, it applied because it was expected that the State rather than the federal government would build and operate the Central Valley Project, and the State wanted to obtain the earliest possible priority dates in its own water rights.
> (footnote omitted)

It was apparent in 1944 that New Melones was to be built and operated as a Federal Project. It was authorized in the Flood Control Act of 1944, 58 Stat. 887. See also § 203 of the Flood Control Act of 1962, 76 Stat. 1191. Thus, when the State applied for water rights for New Melones in 1952, its purpose was, as it says, to obtain early priority dates, and its intent must have been to do what it ultimately did, to assign its applications to the Bureau of Reclamation, which was to build and operate the project.

We conclude that the Bureau, as assignee of an application, is no more subject to the imposition of conditions by the Board than it is as an original applicant.

The petition for a rehearing is denied.

WALLACE, Circuit Judge, concurring in part:

I concur in part. Concluding that the first of Judge Duniway's reasons to deny the petition is more than adequate ("the assignment was of an application, not of a permit containing conditions"), I would not reach the constitutional issue. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). [1354]

The UNITED STATES of America,
Plaintiff,

v.

The STATE OF CALIFORNIA et al.,
Defendants.

Civ. No. S-3014.

United States District Court,
E. D. California.

Oct. 9, 1975. [874]

John H. Germeraad, Douglas N. King, U. S. Dept. of Justice, Washington, D. C., Richard Nichols, Asst. U. S. Atty., Sacramento, Cal., for plaintiff.

Evelle J. Younger, State Atty. Gen., and Richard C. Jacobs, Roderick E. Walston, San Francisco, Cal., for defendants.

OPINION

MacBRIDE, Chief Judge.

At the turn of the century, a burgeoning nation was in the midst of Western expansion. Hampering this expansion, however, was the simple geographical fact that great areas within the Western states and territories encompassed arid and semiarid lands. By the enactment of the Reclamation Act of 1902, Title 43 U.S.C. § 371 *et seq.*, Congress concluded that much of these arid and semiarid lands could be made habitable and fruitful by the construction of federally-funded irrigation works.

Now, 73 years, dozens of projects, and billions of dollars later, this court is asked to enter "the delicate area of federal-state relations in the irrigation field,"[1] and resolve

1. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958).

the question whether a state may impose terms and conditions on the federal government's acquisition of water for reclamation projects.

The United States initiated suit in this court on October 15, 1973, against the State of California, the State Water Resources Control Board, and its members. Jurisdiction was grounded under Title 28 U.S.C. § 1345, conferring original jurisdiction to the district courts over all civil actions, suits or proceedings commenced by the United States. The amended complaint of the United States seeks declaratory relief pursuant to Title 28 U.S.C. § 2201 as follows:

(1) Declaratory judgment that the United States can appropriate unappropriated water necessary for use in any federal reclamation project within the State of California, without the necessity of applying to the California State Water Resources Control Board;

(2) Declaratory judgment that when the United States chooses as a matter of comity to submit applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available;

(3) Declaratory judgment that when the United States chooses as a matter of comity to submit applications to the California State Water Resources Control Board, that Board cannot impose any terms or conditions in permits issued pursuant to such applications in contravention of federal law or which are not specifically authorized and required by federal laws, federal regulations, or federal administrative directives;

(4) Declaratory judgment that Decision 1422,[2] an April 4, 1973, decision of the California State Water Resources

2. The conditions and terms imposed by Decision 1422 are specified hereafter in this opinion.

Control Board, is void in all respects where that decision conflicts with or contravenes federal law or requires action not specifically authorized and required by federal laws, federal regulations, or federal administrative directives. [877]

By its answer, California[3] raises the following legal issues in response:

(1) The United States is required to comply with all terms and conditions imposed by California on permits issued to the United States Bureau of Reclamation to appropriate water for reclamation purposes in California, pursuant to Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, 32 Stat. 390;[4]

(2) The United States is required to comply with all terms and conditions imposed by California on permits issued to the United States Bureau of Reclamation to appropriate water for reclamation purposes in California, pursuant to recent environmental legislation passed by Congress, including the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, 83 Stat. 852, and the National Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371, 84 Stat. 114;

(3) The United States, by accepting assignments for permit applications and by submitting its own permit applications, has agreed to comply with California law in appropriating water for reclamation purposes in California;

(4) The United States has accepted the benefits of the permits issued by California since 1938, and is thus estopped to deny the truthfulness of the statement that it must comply with all terms and conditions imposed by California's permits;

(5) The United States failed to file mandamus action or to seek judicial review in California of Decision 1422 in accordance with California law, and thus the doctrine of *res judicata* bars the United States from alleging the invalidity of Decision 1422.

On September 3, 1974, California moved for summary judgment pursuant to FRCP 56 and for judgment on the pleadings in accordance with FRCP 12(c). By these motions, California contends that there is no genuine dispute of any material fact and that the case is purely one of interpretation of federal and California law. The case is here now for disposition on these motions.[5] To fully understand the posture of this case and the nature of the question presented herein, it is necessary to review its immediate history.

3. For the purposes of brevity and clarity, all defendants in this action shall be referred to as "California."

4. A detailed discussion of Section 8 of the Reclamation Act of 1902 will be made later in this opinion. Section 8 reads as follows:

> "Nothing in [this act] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

5. By order of this court dated July 8, 1974, all action, except for discovery, in four companion cases was stayed pending a decision in the instant case. The stayed cases include: *Central Valley Eastside Project Association v. State Water Resources Control Board* (Civ S-2582); *Kern County Water Agency v. State Water Resources Control Board* (Civ S-2583); *San Joaquin County Flood Control and Water Conservation District v. State Water Resources Control Board* (Civ S-2730); and *State of California v. Morton* (Civ S-2924). All parties in these actions were given leave to file briefs in the instant case as *amici curiae*.

HISTORY OF THE CASE

Following the enactment of the Reclamation Act of 1902, Congress from time to time has authorized specific reclamation projects by way of special reclamation acts. One such special project which was eventually authorized by Congress was the Central Valley Project [hereafter CVP] which envisioned the coordinated development of the Sac-[878] ramento and San Joaquin Rivers and their tributaries through a system of physical works to regulate and distribute water needed for agricultural, industrial and municipal uses in the Central Valley of California. The CVP was authorized by the State of California through the Central Valley Project Act of 1933, Cal.Stats. Ch. 1042. California thereafter sought and secured federal assistance through the Rivers and Harbors Act of August 30, 1935, P.L. 74-409, 49 Stat. 1028, 1038; the Act of June 22, 1936, P.L. 74-739, 49 Stat. 1597; and the Rivers and Harbors Act of August 26, 1937, P.L. 75-392, 50 Stat. 844, 850. The Act of October 17, 1940, 54 Stat. 1198 provided in pertinent part as follows:

> ". . . that the entire Central Valley Project, California. . . ., is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, for the reclamation of arid and semi-arid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes. . . ."

Construction of CVP was begun in 1937 and the initial units of CVP were placed into full coordinated operation in 1951. Speaking of the scope of the project, the Supreme Court of the United States noted in the case of *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958):

> "Central Valley is the largest single undertaking yet embarked upon under the federal reclamation program. It was born in the minds of far-seeing Californians in their endeavor to bring to that State's parched acres a water supply sufficiently permanent to transform them into veritable gardens for the benefit of mankind. Failing in its efforts to finance such a large undertaking, California almost a quarter of a century ago petitioned the United States to join in the enterprise. The Congress approved and adopted the project, pursuant to repeated requests of the State, and thus far has expended nearly a half billion dollars." 357 U.S. at 280, 78 S.Ct. at 1178.

Over the years, water uses increased in the Central Valley and Congress continued to authorize additional units and funds for CVP. One such unit, and the subject matter of the instant case, was the New Melones Project. The New Melones Project was originally authorized by the Flood Control Act of December 22, 1944, P.L. 78-534, 58 Stat. 887, and reauthorized by the Flood Control Act of October 23, 1962, P.L. 87-874, 76 Stat. 1180, 1191. The Flood Control Act of 1962 reads in part as follows:

> ". . . That upon completion of construction of the dam and powerplant by the Corps of Engineers, the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamations laws. . . ."

The New Melones Project provides for a dam on the Stanislaus River, approximately 35 miles northeast of Modesto, California, to create a reservoir with a gross storage capacity of about 2,400,000 acre-feet,[6] for flood control, irrigation, municipal, industrial, domestic, [879] power, recreation, water quality control, and fish and wildlife purposes. The New Melones Project provides also for the construction of a 300,000 kilowatt capacity hydro-electric powerplant immediately below the dam.

The United States, through the Bureau of Reclamation, Department of the Interior [hereafter the Bureau], had regularly applied to the California State Water Resources Control Board [hereafter the Board], and its predecessor, in accordance with California law, for permits authorizing appropriations of water. Similarly, the United States, through the Bureau, sought to obtain permits to appropriate unappropriated water from the Stanislaus River for development of the New Melones Project. To this end the Bureau filed with the Board applications Nos. 19303 and 19304, and sought assignments of applications Nos. 14858 and 14859.[7] The Board on April 4, 1973, rendered Decision 1422 which ruled on these applications. Although Decision 1422 granted the assignments and allowed permits to be issued for all the applications, it placed various terms and conditions on the permits. While California asserts that it has the authority to place terms and conditions on permits authorizing appropriations of water for reclamation projects, the United States counters that any imposition of terms and conditions by the state is impermissible.

6. It is estimated that this storage capacity would create a lake stretching approximately 13 miles behind the dam.

7. Applications Nos. 14858 and 14859 were originally filed in 1952 by the California Department of Finance. The Bureau sought assignment of these applications rather than file new ones so as to obtain a priority date of appropriation in accordance to California law.

DECISION 1422

As noted above, the Bureau applied to the Board for permits in the New Melones Project in accordance with four separate applications:

(1) Application 14858 was for a permit to appropriate 8,800 cubic feet per second [cfs] of water by direct diversion year round, and 980,000 acre feet per annum [afa] by storage to be collected from October 1 of each year to July 1 of the succeeding year for irrigation, domestic, municipal, industrial, fish culture, recreation, and water quality purposes from the Stanislaus River in Calaveras and Tuolumne Counties.

(2) Application 14859 was identical to Application 14858 except its purpose was to use the water for power generation purposes.

(3) Application 19303 was for a permit to appropriate 6,000 cfs by direct diversion and 2,400,000 afa by storage, both year round, for power generation from Stanislaus River in Calaveras and Tuolumne Counties.

(4) Application 19304 was for a permit to appropriate 2,250 cfs by direct diversion, and 2,400,000 afa by storage both year round, for irrigation, domestic, municipal, industrial, fish culture, recreation, and water quality control purposes from the Stanislaus River in Calaveras and Tuolumne Counties.

The primary point of diversion under all four applications is the proposed New Melones dam on the Stanislaus River, but there is also included a Knight Ferry division dam downstream from the New Melones dam.[8]

8. The Knights Ferry dam is listed as a point of direct diversion under applications Nos. 14858 and 19304.

Numerous protests were filed in opposition to these applications by various individuals, companies, public agencies such as the Department of Fish and Game, and private associations such as the Environmental Defense Fund and the Sierra Club. These protests were concerned primarily with environmental matters or purported problems of diversion as related to prior users.

[1] California law requires the Board to evaluate the specific intended use of each proposed project and find that it is reasonable, beneficial, and in [880] the public interest. The Board undertakes a balancing of competing demands and policy considerations and has broad discretion. Cal. Water Code § 1240; *Temescal Water Co. v. Department of Public Works,* 44 Cal.2d 90, 280 P.2d 1 (1955). As a preliminary matter, it should be noted that the Board concluded that sufficient unappropriated water was available to supply the Bureau's requests, other factors being equal.[9] Beyond this determination, the Board in Decision 1422 expressed several concerns:

(1) Perhaps of primary concern to the Board was the belief that the limited unappropriated resources of California should not be committed to an applicant in the absence of a showing of actual need for the water presently and within a reasonable time in the future. The Board noted:

> "The lack of evidence that the New Melones Project water will be needed for consumptive use outside the four basic counties [Tuolumne, Calaveras, San Joaquin, Stanislaus] for many years to come, if ever, or that it will be used within those counties at any definite time in the future, raises substantial doubt whether permits should be issued to impound more water in the

9. Decision 1422 at page 26.

> New Melones Reservoir, at least at this time, than is needed for satisfaction of prior rights and non-consumptive purposes—protection and enhancement of fish and wildlife, water quality, recreation, and the generation of power." Decision 1422 at page 17.

The Board noted that the Bureau had presented no specific plan for applying project water for consumptive purposes at any particular location. Further, the Board noted that CVP has substantial quantities of water that are not being used and are not under contract.

(2) The Board was further concerned that the reservoir which would be created by the New Melones dam would eliminate the use of the Stanislaus River for whitewater recreation and for stream fishing. The Board recognized that the reservoir would serve as a man-made lake for purposes of recreation and fishing, but did not consider this an equivalent substitute for the river's natural sources of recreation and fishing. The Board concluded:

> "In view of the preponderance of the adverse consequences of maintaining a reservoir of the size proposed by the Bureau, the public interest requires that any permits issued pursuant to Applications 14858 and 19304 prohibit the impoundment of water in New Melones reservoir for consumptive purposes until further order of the Board following a showing that the benefit that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the permittee has firm commitments to deliver water for such purposes." Decision 1422 at page 18.

(3) Another concern of the Board was the effect on the Stanislaus River salmon fishing resource—estimated to be worth $300,000 per year—by the granting of applications

Nos. 14858 and 19304. Further study of this factor was felt to be necessary.

(4) The final major issue concerning the Board dealt with the question of granting the applications for the purpose of water storage. The question the Board posed to itself was whether the need for maintaining the river at its present regimen outweighed the need for additional power. Although the Board found that the annual benefits of the power function would be $5.5 million, it felt that the use of the river for recreation and environmental factors—especially whitewater uses and stream fishing—outweighed. [881]

In summary, the Board concluded:

> "There is unappropriated water available to satisfy the demands of the project as proposed. However, the Bureau has no definite plan as to when or at what specific locations project water will be used for consumptive purposes outside the four basin counties, and it has sufficient surplus water from other sources to meet future increased demands outside these counties for a long period of years. Permits should not be issued for use of water outside these counties at this time.
>
> The public interest requires that the use of the Stanislaus River for whitewater boating, stream fishing and wild life habitat be protected to the extent that water is not needed for other beneficial uses. Therefore, although there is a demonstrated need for the full yield of the project for the four basin counties at some time in the future, but for which no contracts have been negotiated, and in view of the adverse effect the proposed reservoir will have upon these recreational uses, impoundment of water to satisfy that need should not be permitted at this time. Instead, the Board should retain jurisdiction over the permits for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when the need for the water is substantial." Decision 1422 at pages 26-27.

The Board thereupon approved assignment of applications Nos. 14858 and 14859 to the Bureau, and approved these applications and applications Nos. 19303 and 19304, in part. Permits were issued subject to 25 separate terms and conditions. It would serve no useful purpose at this stage to delve extensively into the particulars and requirements of these 25 terms and conditions. However, a summary of these terms and conditions will be helpful to an understanding of the posture of this case:

(1) Conditions relating to impoundment—Conditions 1 and 2 defer full impoundment of all the waters sought by the Bureau until such time as the Bureau is able to demonstrate a plan or a firm commitment for the use of project water.

(2) Conditions relating to reservation of jurisdiction—Conditions 6, 9, 13, 20, and 22 reserve jurisdiction to the Board to impose further conditions on the Bureau to protect the "beneficial use" of water involved.

(3) Conditions relating to reporting requirements—Conditions 3, 7, 8, 12, and 21 impose requirements of further or continuing study or the filing of specified reports.

(4) Conditions limiting or controlling the use of water—Conditions 4, 5, 14, 19, 23, 24, and 25 place various limits or controls on the use of water to or from the project.

(5) Conditions relating to time—Conditions 10 and 11 impose various time constraints on completion of the project and application of water.

(6) Conditions relating to accessability—Conditions 15 and 16 discuss the access to be afforded to representatives of the Board and members of the public.

(7) Conditions imposing mandatory requirements—Condition 17 imposes the requirement on the Bureau to install an outlet pipe "as near as practicable to the bottom of the natural stream channel"; condition 18 requires the Bureau to clear vegetation and structures from the side of the

reservoir in accordance with California Water Code provisions.

QUESTIONS PRESENTED

Although the United States initiated this action in quest of declaratory relief, the legal issues presently before the court are framed by California's motions for summary judgment and judgment on the pleadings. To facilitate analysis, it is possible to consolidate under three general categories, the questions presented by California's motions:

(1) *Interpretation of federal law*—Does Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, require federal [882] agencies, in appropriating water for reclamation purposes, to comply with state law? In this regard, California has asked the court to consider (a) the plain language and the Congressional history of the Reclamation Act of 1902; (b) the cases which have considered the Act;[10] (c) the analogies which might be drawn from other Acts of Congress enacted subsequent to the Reclamation Act of 1902;[11] (d) and the administrative practice of the Bureau of Reclamation.

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10. The cases on which the parties primarily rely include: *Nebraska v. Wyoming*, 295 U.S. 40, 55 S.Ct. 568, 79 L.Ed. 1289 (1935); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356 (1935); *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945); *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 466, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958); *Fresno v. California*, 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28 (1963); *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963); *Ivanhoe Irrigation District v. All Parties*, 53 Cal.2d 692, 3 Cal.Rptr. 317, 350 P.2d 69 (1960).

11. Specific acts relied upon include the Federal Water Supply Act of 1958, 43 U.S.C. § 390b; the Auburn-Folsom South Project Act, 43 U.S.C. §§ 616aaa-616fff (1965); the National Environmental Policy Act of 1969, 42 U.S.C. § 4321; and the National Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371. In oral argument, California abandoned any reliance on the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1972).

(2) *Contentions in the nature of estoppel*—(a) Should the United States be equitably estopped to deny the validity of the Board's jurisdiction and of Decision 1422 because the United States initiated proceedings before the Board? (b) What is the *res judicata* and collateral estoppel effect of Decision 1422 as to the United States arising from the failure of the United States to appeal that decision pursuant to California law? (c) Should the court find that as a matter of law Decision 1422 does not materially alter or conflict with the purposes of the New Melones Project? (d) Would the failure to enforce Decision 1422 be contrary to the public policy of the people of California?

(3) *Procedural considerations*—Are the questions presented by this case appropriately determined and resolved by summary procedure?

INTERPRETATION OF FEDERAL LAW

Both the United States and California have admitted to this court in oral argument that pursuant to the Supremacy Clause of the United States Constitution, U.S.Const. Art. VI cl. 2, and because of national implications inherent in reclamation of arid and semiarid lands, the Congress *could* afford all power and control over federal reclamation projects to the federal government, reserving no power or control for the states. See *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 294, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958). The United States has argued that Congress did just that when it enacted the Reclamation Act of 1902. By its reading of that Act, the United States contends that: (1) because all power and control over reclamation projects has been given to the federal government, it need not even apply to the states for permits to appropriate water for such projects, and (2) even if the federal government, because of comity, does apply to the states for permits to appropri-

ate water, the states' sole function is to determine whether there exists sufficient unappropriated water for the project. California, on the other hand, has argued that the Congress, by way of the Reclamation Act of 1902 and other federal legislation, intended that the federal government should physically operate reclamation projects, but that the federal government must comply with state law in the appropriation of water for projects.[12] Thus, the essential dispute between the litigants here is not whether the Congress *could* preempt the field, but whether the Congress *has chosen* to do so. [883]

(1) The Reclamation Act of 1902.

At the very heart of this inquiry is the Reclamation Act of 1902 [hereafter the 1902 Act]. In 1902 the Western states and territories contained nearly one billion acres of land and comprised somewhat more than half of the United States' contiguous area. Great segments of this Western land, however, lay dry and fallow, either unnourished or undernourished by the nation's waterways. Over one-third of North and South Dakota were within the arid and semiarid belts. The portions of the States of Oregon and Washington lying west of the Cascade Mountain Range were within the humid climate, while portions lying east of the range, comprising approximately one-half of the territory of the two states, were arid or semiarid. In California arid and semiarid conditions existed over two-thirds of the state. Nearly one-third of Oklahoma was semiarid in character. Although neither Kansas nor Nebraska contained

12. Both in its briefing and in oral argument before this court, California has conceded that even under its view of the law, there would be two major limitations on the rights of states to impose terms and conditions on federal reclamation projects. These two limitations are: (1) the state cannot infringe on any specific grant of power to the federal government under federal law, and (2) the state can only control unappropriated water.

lands which were strictly speaking arid, nearly one-third of the western portion of each state was considered semiarid. The other states and territories of the West were wholly within the arid region, with the exception of limited areas affected by local conditions.[13]

As the United States grew in population, demand for productive land grew proportionately. It was estimated that through proper irrigation, between 35,000,000 and 70,000,000 acres of land in the West could be reclaimed.[14] In 1900 the national platforms of the major political parties declared in favor of the undertaking by the federal government of the work of reclaiming arid and semiarid lands and holding such lands for settlers.[15]

President Theodore Roosevelt also favored development of the Western states and territories through irigation and vigorously urged the enactment of legislation to this end:[16]

> "It is as right for the National Government to make the streams and rivers of the arid region useful by engineering works for water storage as to make useful the rivers and harbors of the humid region by engineering works of another kind. The storing of the floods in reservoirs at the headwaters of our rivers is but an enlargement of our present policy of river control, under which levees are built on the lower reaches of the same streams.
>
> The reclamation and settlement of the arid lands will enrich every portion of our country, just as the settlement of the Ohio and Mississippi valleys brought pros-

13. Report of the House Committee on Irrigation of Arid Lands, 57th Cong. 1st Sess. p. 1 (1902). Other states and territories included: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

14. Report of the House Committee on Irrigation of Arid Lands, 57th Cong. 1st Sess. p. 2 (1902).

15. *Id.* at pp. 4-5.

16. *Id.* at p. 5.

perity to the Atlantic States. The increased demand for manufactured articles will stimulate industrial production while wider home markets and the trade of Asia will consume the larger food supplies and effectually prevent Western competition with Eastern agriculture. Indeed the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries which would otherwise not come into existence at all. Our people as a whole will profit, for successful home making is but another name for the upbuilding of the nation."

Before enacting the 1902 Act, Congress carefully considered the alternatives that either private enterprise or the states themselves develop reclamation projects, rather than the federal government. It was recognized that private enterprise had constructed various irrigation projects in the past, but it was also recognized that such private projects were of a relatively simple character, intended to supply only single farms [884] or limited areas of country.[17] As to the various states, the Congress considered lack of adequate funds for such extensive projects to be the most serious impediment.[18] Congressman Mondell, the leading advocate in the House for passage of the 1902 Act, suggested other reasons why the federal government, rather than the states, construct the reclamation projects:[19]

> "It has been suggested that if private enterprise can not properly develop large irrigation systems the work might be undertaken by the respective States. There are many reasons why the States are not so well equipped to carry on this work as the Federal Government.

17. *Id.* at pp. 2-3. House Debate on the Reclamation Act of 1902, 35 Cong.Rec. 6669 at 6675 (1902).

18. House Committee at pp. 3-4.

19. House Debate at p. 6676.

> In the first place, were the work carried on by the States, the disposition would be to utilize all of the waters flowing through a State within the State, provided there was no prior appropriation lower down on the stream, regardless of the most beneficial and economical development of the irrigation possibilities of the entire region. Further, the constitutions of some of the States forbid the undertaking of works of internal improvement; and even were the States the proper agency through which to carry on this development, none of the States in the arid region, are financially able to do so."

Nevertheless, the Congress was mindful that the individual states had substantial and legitimate interests in the appropriation, use, and distribution of water used for irrigation. There were interests represented in the Congress which favored strong States' rights and advocated legislation whereby the federal government would simply build the reclamation project works and then turn over to the states control of the waters. On the other hand, there were advocates of reclamation legislation which would be more limiting on the States' authority, with power vested primarily in the federal government.

Section 8 of the 1902 Act as originally drafted and passed by the Senate was a strong States' rights provision:[20]

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation; *but State and Territorial laws shall govern and control in the appropriation, use and distribution of the waters rendered available by the works constructed under the provisions of this act:* Provided, That the right to the use of water acquired under the

20. S. 3057, 57th Cong., 1st Sess., § 8 (1902).

provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right." [emphasis added].

The above-quoted provision was then amended in the House Committee on Irrigation of Arid Lands. It is the House amendment which was enacted into law and that amendment reads as follows:[21]

> "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, *or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to or from any interstate stream or the waters thereof:* Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the [885] land irrigated and the beneficial use shall be the basis, the measure, and the limit of the right." [emphasis added.]

The change the House Committee made in the legislation apparently resulted from intervention by President Roosevelt, as noted by Representative Robinson of Indiana:[22]

> "At the beginning of this session the arid-State members in committee assembled properly elected the gentleman from Nevada chairman and proceeded to draft an irrigation bill. The committee was composed of a large majority of Republicans, but politics was submerged to get some irrigation legislation. The committee, of course, was confronted with platforms and constitutions, national and State. Where they pointed their way, they adopted them; where they ran counter, they ran over them or passed them by.
>
> They took up first the Republican national platform of 1900, and upon that this bill was drafted and introduced in the Senate. After a little while the bill passed without a division in the Senate, and went to the House Committee on Arid Lands, a majority of whose members are from arid or semiarid States.
>
> The troubles then began. The President was for one kind of irrigation, with national control of canals and water distribution, and the Republican platforms, national, State, and Territorial, and some State constitutions of States affected, were for another kind, with State control of canals and water distribution. The President told the committee that called on him that the Senate bill was not in consonance with his ideas of irrigation; that if the United States built canals it should, to keep the water supply from politicians, control the distribution."

This presidential intervention and its purpose was confirmed by President Roosevelt in his autobiography:[23]

> "On the day the message was read, a committee of Western Senators and Congressmen was organized to prepare a Reclamation Bill in accordance with the recommendations. By far the most effective of the Senators in drafting and pushing the bill, which became known by his name, was Newlands. The draft of the bill was worked over by me and others at several conferences and revised in important particulars; my active interference was necessary to prevent it from being made unworkable by an undue insistence upon State Rights, in accordance with the efforts of Mr.

21. House Committee at p. 20.

22. House Debate at p. 6670.

23. Theodore Roosevelt; An Autobiography, at p. 396 (Scribner 1926).

> Mondell and other Congressmen, who consistently fought for local and private interests as against the interests of the people as a whole."

Time and again during the Congressional debates, the supporters of the 1902 Act made clear the understanding that reclamation was a *national* project to be undertaken by the national government. To the suggestion that the federal government not itself reclaim the land in question but rather cede the land to the states, Congressman Reeder notes:[24]

> "We have been told that the Government, which is the owner of these lands, should not reclaim them itself, but should cede them to the States. It is sufficient answer to that to say that many State grants have been already made of different amounts of land and for different purposes, and the experience of the past has demonstrated beyond any question that the States cannot be safely intrusted with the reclamation and settlement of these lands. No matter what conditions might be imposed on such a grant, schemers and speculators would find some way of manipulating the State legislatures and getting control [886] of the lands in large tracts which would retard settlement."

And again Congressman Newlands notes as follows:[25]

> "Nothing can be accomplished by conveying this land to the States. The State lines are arbitrary lines, not drawn with reference to the watersheds, but arbitrarily by the surveyors, straight north, south, east and west. Were these States so bounded that each could compose an entire watershed, with all of its tributaries, then it would be possible to cede all the public domain to the States with the expectation of some just and proper result, but a river, with all its tributaries, may

24. House Debate at p. 6740.

25. *Id.* at p. 6734.

> reach into four or five States. Scientific reclamation requires conservation regardless of State lines."

However, by the inclusion of Section 8, Congress recognized that notwithstanding the national scope of reclamation, state law had important, albeit limited, functions in the equation. Certainly, Section 8 on its face does not make crystal clear the role of state law, although it is apparent that state law *does* have a role in regard to federal reclamation projects. By a careful reading of the Congressional history, however, it is apparent that state law would have at least two functions under Section 8 of the 1902 Act.

[2] As to the first function, Congressman Martin indicated that Section 8 would be used to modify and complement Section 7, which latter section dealt with the federal government's power of eminent domain:[26]

> "[Section 7] should be read in connection with section 8, which is in the nature of a limitation upon this section. Section 8 provides that the Secretary of the Interior, when proceeding under this act, must proceed in conformity with the State laws. It therefore makes, taking the two sections together, simply an instruction to the Secretary of the Interior to invoke the aid of the State laws upon the subject of eminent domain where necessary."

Indeed, it was settled by the Supreme Court in *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 466, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958) and in *Fresno v. California,* 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28 (1963), that Section 8 requires the federal government to look at state law to define the property interests for which compensation must be made pursuant to Section 7 eminent domain proceedings.

26. *Id.* at p. 6759.

[3] Secondly, Section 8 is a reaffirmation of the doctrine that the states are free to apply their own rules of water law and the federal government cannot enforce any particular rule upon any state. Section 8 was not written upon a clean slate, but rather, on the overlay of prior federal law. As examples of the federal legislation upon which Section 8 was based, Congressman Mondell cited the Act of July 26, 1866 (14 Stat. 253); the Act of July 9, 1870 (16 Stat. 218); and the Act of March 3, 1877 (19 Stat. 377).[27] In *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356 (1935), and cases cited therein, the Supreme Court noted as follows:[28]

> "For many years prior to the passage of the Act of July 26, 1866 [citations omitted], the right to the use of water for mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The first appropriator of water for a beneficial use was uniformly recognized as having the better right to the extent of his actual use. The common law with respect to riparian rights was not considered applicable, or, if so, only [887] to a limited degree. Water was carried by means of ditches and flumes great distances for consumption by those engaged in mining and agriculture. [citations omitted] The rule generally recognized throughout the states and territories of the arid region was the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision,

27. *Id.* at p. 6679; other acts cited include the Act of March 3, 1891 (26 Stat. 1095) and the Act of June 4, 1897 (30 Stat. 1136) [sic].

28. 295 U.S. at 154, 55 S.Ct. at 727.

> but by local and customary law and usage as well. [citations omitted].
>
> This general policy was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866. [citations omitted]"

The Supreme Court further explained that the Act of July 9, 1870, which amended the Act of 1866, was a reaffirmation of the doctrine that the states are free to apply their own rules of water law.[29] See also *Kansas v. Colorado*, 206 U.S. 46, 94, 27 S.Ct. 655, 51 L.Ed. 956 (1907).

Finally, the Supreme Court notes that the Desert Land Act of March 3, 1877, is fully consistent with this doctrine:[30]

> "The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what might be an impediment to its full and successful operation."

[4] Similarly, Section 8 does not bind or purport to bind the states to any policy, but recognizes and gives sanction, as far as the United States and its grantees are concerned, to the state law doctrine of appropriative rights to water. In this regard, also, Section 8 guards prior rights granted by the individual states to individual water users.

As noted by Congressman Mondell in his committee's report to the House:[31]

29. *Id.* at p. 155, 55 S.Ct. 725.

30. *Id.* 295 U.S. at p. 164, 55 S.Ct. at 731.

31. House Committee at p. 8.

> "The American irrigator, beginning with the handicap of a woeful lack of knowledge of the subject, and an inherited common-law rule fatal to its solution, has acquired a vast fund of theoretic knowledge and practical experience. He has been instrumental in the adoption of rules and regulations, and the establishment of customs, relative to the use of water in irrigation to the arid region which, in some States, are well-nigh perfect, and in all are a distinct advance over former conditions. The bill recognizes the control of these local laws in matters of recording appropriations of water and in establishing and maintaining rights of users. . . ."

California, however, discerns another meaning within the words of Section 8. In short, California reads Section 8 as requiring the federal government to apply to affected states for permits to appropriate water for reclamation projects and to comply with terms and conditions which the affected states might impose (as long as not expressly prohibited by other federal law), before the federal government can acquire the water necessary to construct the project.

As an initial matter, it is at least arguable whether the United States, in acquiring water for the development of a reclamation project, should be considered an "appropriator" in the true legal sense of that term. Appropriation of a water right implies legal title thereto, and as the Supreme Court noted in *Ickes v. Fox,* 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937):[32]

> "Although the [federal] government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water or [888] water rights became vested in the United States is not well

32. 300 U.S. at pp. 94-95, 57 S.Ct. at pp. 416-417.

> founded. Appropriation was made not for the use of the government, but, under the Reclamation Act [of 1902], for the use of the landowners."

Perhaps for clarity, it would be better to consider the federal government's actions in obtaining water for the development of reclamation projects as the "acquisition" rather than the "appropriation" of water.

However, even if the federal government is considered to be "appropriating" the water required to develop and operate the reclamation project, it is certainly not clear from the language of Section 8 nor from the Congressional history that the federal government must apply to states for permits to appropriate or that the federal government must comply with terms and conditions which states might impose on such permits.

If anything, the Congressional history of Section 8 indicates the opposite interpretation: that reclamation is an undertaking of national concern, transcending the often arbitrary geographic boundaries of individual states and territories. Even a leading States' rights advocate such as Senator Clark recognized the necessity of broad federal power in the development and construction of reclamation projects:[33]

> "The question of the conversation of waters is one of national importance; the question of reservoir sites and reservoir building is one that appeals to the [federal] Government as a matter of national import, but the question of State or Territorial control of waters after having been released from their bondage in the reservoirs which have been provided is a separate and distinct proposition . . . .

33. Senate Debate on the Relamation Act of 1902, 35 Cong. Rec. p. 2222.

> It is right that the General Government should control, should conserve, and should reservoir the headwaters of these streams. In this it is a national and not a State proposition. But in the distribution of these waters . . . it is right and proper that the various States and Territories should control in the distribution."

Of course, Senator Clark's suggestions as to the power of the *States* in controlling distribution were rejected by the House and ultimately, by Congress as a whole. Nevertheless, his comments are relevant and useful on the question of *federal* power regarding the development and construction of reclamation works.

The only comment within the Congressional history of the 1902 Act which might be supportive of California's position is a statement by Congressman Mondell in response to a question seeking clarification of the federal-state relationship envisioned by the 1902 Act. Congressman Mondell noted that it was necessary for the federal government, after determining the need and feasibility for a particular reclamation project, to refer to the affected state by "giving the notice and complying with the forms of law of the State . . . in which the works [are to be] located."[34]

On the one hand, this statement by Congressman Mondell supports California's position that the federal government must apply to affected states before acquiring the water necessary to construct a reclamation project. On the other hand, however, this statement might also be read, as the United States has done, to require compliance with the forms, but not necessarily with the substance of state law.

[5] Indeed, while the Congressional history of the 1902 Act indicates broad federal purpose and authority in the

34. House Debate at p. 6678.

operation and control of federal reclamation projects, the comity inherent in a federal system would not permit an overbroad usurpation of state sovereignity. Accordingly, the federal government is required, when acquiring water for federal reclamation projects, to com- [889] ply with the forms of state law, including application to state water boards where necessary, for two purposes: (1) to enable the state to determine, according to its law, whether there is sufficient unappropriated water available for the project; and (2) to give notice to the state of the scope of the project.

(2) Judicial Interpretation of the Reclamation Act of 1902.

Both the United States and California rely on several judicial decisions relating to the 1902 Act. It is necessary to review these cases to determine if they provide any insight on the question presented by the instant case.

(a) *Nebraska v. Wyoming,* 295 U.S. 40, 55 S.Ct. 568, 79 L.Ed. 1289 (1934) was a suit by Nebraska against the State of Wyoming for equitable apportionment of the waters of the North Platte River. The United States was not made a party to that suit and Wyoming, as part of its motion to dismiss, asserted that the United States was an indispensable party. In deciding that the United States was not an indispensable party, the Supreme Court stated:[35]

> "The bill alleges, and we know as a matter of law [citing Section 8 of 1902 Act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the state of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand

35. 295 U.S. at 43, 55 S.Ct. at 569.

> in judgment for him as for any other appropriator in that state. He is not a necessary party."

Additionally, there is dicta in this opinion which is certainly supportive of the position California advances to this court: the Supreme Court notes that the Secretary of the Interior had applied to the state engineer of Wyoming for permission to construct reservoirs and impound water "pursuant to the [1902] act," and also that the acts of the federal government in operating reservoirs are subject to the law of Wyoming.[36]

This dicta should not be afforded great weight, however, since the actions of the Supreme Court in 1935 should be considered procedural only. In 1938, the Supreme Court allowed the United States to intervene, over the objections of all the state parties, and stated that its order "shall be without prejudice to the determination on final decree of any of the substantive questions of law or fact advanced or to be advanced by any of the parties herein."[37]

(b) *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945) was both a continuation and an extension of the 1935 case. At this time, however, the United States asserted that it owned all of the unappropriated water in the North Platte River at the time it acquired water rights for two federal reclamation projects, the North Platte Project and the Kendrick Project. The Supreme Court did not reach the question whether the United States did, in fact, own all the unappropriated water in the North Platte River because it determined that the United States' acquisition of water rights for the North

36. 295 U.S. at 42, 55 S.Ct. 568.

37. *Nebraska v. Wyoming*, 304 U.S. 545, 546, 58 S.Ct. 1035, 82 L.Ed. 1519 (1938).

Platte Project and the Kendrick Project "have been obtained in compliance with state law."[38]

In fact, the United States had made filings with the state:[39]

> "Initiation of both projects [North Platte Project and the Kendrick Project] was accompanied by filings made pursuant to § 8 [of the 1902 Act] in the name of the Secretary of the In- [890] terior for and on behalf of the United States. Those filings were accepted by the state officials as adequate under state law. They established the priority dates for the projects. There were also applications to the States for permits to construct canals and ditches. They described the land to be served. The orders granting the applications fixed the time for completion of the canal, for application of the water to the land, and for proof of appropriation. Individual water users contracted with the United States for the use of project water. These contracts were later assumed by the irrigation districts. Irrigation districts submitted proof of beneficial use to the state authorities on behalf of the project water users. The state authorities accepted the proof and issued decrees and certificates in favor of the individual water users. The certificates named as appropriators the individual landowners. They designated the number of acres included, the use for which the appropriation was made, the amount of the appropriation, and the priority date. The contracts between the United States and the irrigation districts provided that after the stored water was released from the reservoir it was under the control of the appropriate state officials."

Although the United States did submit the appropriate forms of law to the affected states and thereby gave notice of the construction of the reclamation projects, and also

38. 325 U.S. at 612, 65 S.Ct. at 1348.

39. 325 U.S. at 613, 65 S.Ct. at 1348.

complied with the state law requirements in the construction of canals and ditches carrying water from the projects to users, the Supreme Court was careful to point out an important caveat:[40]

> "Nor, as we shall see, is it important to the decree to be entered in this case that there may be unappropriated water to which the United States may in the future assert rights through the machinery of state law *or otherwise.*" [emphasis added]

And again the Court noted as follows:[41]

> "We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made."

On the one hand, these quotations may only be a reference to the power of eminent domain which the United States might have exercised pursuant to Section 7 of the 1902 Act. Viewed broadly, however, the quotations indicate a recognition that in the particular case before the court the United States *had* followed state law, but that opinion is reserved whether, under the circumstances of that case, the United States was *required* to do so under the 1902 Act.

And finally, the Supreme Court noted the narrow issues decided by the case, and indicated that its decision "in no

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40. 325 U.S. at 612, 65 S.Ct. at 1348.

41. 325 U.S. at 615, 65 S.Ct. at 1349.
The following language from the *Nebraska* opinion is also noteworthy:

> "We do not suggest that where Congress has provided a system of regulation for Federal projects it must give way before an inconsistent state system." 325 U.S. at 615, 65 S.Ct. at 1349.

This admonition was later borne out in *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958), discussed infra.

wise interfers with the ownership and operation by the United States of its storage and power plants, works, and facilities."[42]

(c) *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958) is not particularly helpful to either the United States or California in the disposition of the instant case. In *Ivanhoe* the United States Supreme Court reversed several decisions of the California Supreme Court which had refused to confirm certain contracts entered into between two state irrigation districts and a water agency on the one hand, and the United States on the other. The California Supreme Court had held that the language of Section 8 requiring compliance with state law overrode the [891] requirements of Section 5, which provides generally that no project water should be sold for use on land parcels exceeding 160 acres in size. The California court found that Section 5 of the federal law would be contrary to California law because it would result in discrimination against owners of parcels exceeding 160 acres. This decision led the court to refuse to confirm the aforementioned contracts. The United States Supreme Court in reversing the California Court, stated as follows:[43]

> "As we read § 8, it merely required the United States to comply with state law when, in the operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State. . . .

The California Supreme Court on remand in *Ivanhoe Irrigation District v. All Parties,* 53 Cal.2d 692, 3 Cal.Rptr.

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42. 325 U.S. at 616, 65 S.Ct. at 1349.

43. 357 U.S. at 292, 78 S.Ct. at 1183.

317, 350 P.2d 69 (1960), recognized the scope of federal power in operating reclamation projects when it noted:[44]

> "[The United States Supreme Court] expressly held that the United States may acquire, by condemnation if necessary, whatever water rights it may need to operate the project, so that after such acquisition such rights are not subject to state control."

However, this court feels that the true impact of the United States Supreme Court's decision in *Ivanhoe* as it relates to this case is not so much what the court said, but rather, what the court did not say. While recognizing that Section 8 did not require the United States to violate Section 5 merely because state law was not consistent with the requirements of Section 5, the United States Supreme Court expressly noted that its decision should not be read as "passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field."[45]

(d) *City of Fresno v. California,* 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28 (1963) is not particularly relevant to the inquiry in this case, although it is cited by both parties herein. *Fresno* merely stands for the proposition that while Section 8 of the 1902 Act requires compliance with California law when defining the property interests, if any, for which compensation must be made pursuant to the Section 7 eminent domain power, Section 8 cannot operate to prevent the United States from exercising the power of eminent domain.

(e) *Arizona v. California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), while primarily concerned with the construction of Section 14 of the Boulder Canyon Project

44. 53 Cal.2d at 715, 3 Cal.Rptr. at 330, 350 P.2d at 82.

45. 357 U.S. at 292, 78 S.Ct. at 1184.

Act,[46] necessarily interpreted the applicability of Section 8 of the 1902 Act, since, under Section 14 of the Boulder Canyon Project Act, the reclamation law shall govern the management of the works, except as otherwise provided.

The Boulder Canyon Project Act established a reclamation project on the Colorado River. Notwithstanding the federal government's construction, ownership, operation, and maintenance of the Colorado River works and the broad power given by Congress to the Secretary of the Interior to make contracts for the distribution of water, it was argued that Sections 14 and 18 of the Boulder Canyon Project Act took away virtually all of the Secretary's power by permitting the States to determine with whom and on what terms the Secretary would make water contracts. The Supreme Court disagreed with this argument.

Section 18 of the Boulder Canyon Project Act states: [892]

> "Nothing herein shall be construed as interfering with such rights as the States [now have] either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders."

The Supreme Court noted as follows:[47]

46. 45 Stat. 1057, 43 U.S.C. §§ 617-617t (1928).

47. 373 U.S. at 585-587, 83 S.Ct. at 1490-1491. The partial dissenting opinion of Mr. Justice Harlan is helpful in focusing on the narrowness of the Supreme Court's determination in *Ivanhoe.* Justice Harlan notes:

> "[*Ivanhoe*], despite its dictum that § 8 applies only to the acquisition of rights by the United States and not to the operation of a dam, holds only that the clear command of § 5 of the [1902 Act]—that water deliveries to each user not exceed the quantity required for 160 acres—prevails over state law, not that state law does not generally govern priorities in the use of water from federal reclamation projects under § 8." 373 U.S. at 623-624, 83 S.Ct. at 1510.

"Section 14 provides that the reclamation law, to which the Act is made a supplement, shall govern the management of the works except as otherwise provided, and § 8 of the Reclamation Act [of 1902], much like § 18 of the Project Act, provides that it is not to be construed as affecting or interfering with state laws 'relating to the control, appropriation, use, or distribution of water used in irrigation.' In our view, nothing in any of these provision affects our decision, stated earlier, that it is the Act and the Secretary's contracts, not the law of prior appropriation, that control the apportionment of water among the States. Moreover . . . we hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections to follow state law.

The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by his court in [*Ivanhoe* and *Fresno*] . . . . Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in [*Ivanhoe*], we cannot, consistently with *Ivanhoe,* hold that the Secretary must be bound by state law in disposing of water under the Project Act."

California has argued, however, that the Boulder Canyon Project differs significantly from the New Melones Project in that the former is an interstate development, whereas the latter is "wholely intra-state." This contention ignores the fact that reclamation projects, as a whole, are of national importance, transcending state lines. And this is so even where the project works are located solely within the geographical confines of a single state. Crops raised by project water in California, for example, may feed families in Maine, or create processing jobs in Illinois. In *Arizona* it

was clear that the federal government, as operator of the Boulder Canyon Project, could not be subject to the varying and possibly inconsistent commands of different state legislatures in the disposal of water *from* the project. That holding, of course, does not directly answer the question posed by the instant case: whether the federal government must submit to state law in *acquiring* the water for the project.

In summary, it must be said that the cases cited and relied upon by both the United States and by California are more supportive of the position advanced by the United States, than of the position of California.

(3) Other federal legislation.

By analogy to acts of Congress passed into law subsequent to the 1902 Act, California contends that Congress has consistently intended to afford to the states the primary responsibility over "water distribution," and that the role of the federal government is to cooperate and participate with the states in [893] reclamation projects. As an initial matter, it must be reiterated that the issue in this case does not revolve around "water distribution," but rather, "water acquisition." A thorough reading of the enactments cited by California does not, however, evince a Congressional abdication of the federal government's role in developing, operating, and controlling, federal reclamation projects.

[6] (a) California contends that the policy declaration within the Federal Water Supply Act of 1958, 43 U.S.C. § 390b, is a reaffirmation of the primary responsibility of the states over "water distribution." That section reads as follows:

"It is declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for do-

> mestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with State and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects."

Certainly, this section is a recognition of the individual states' primary obligations to develop water supplies for internal uses. On this basis the federal government is charged with participation and cooperation with the states in the development of such water supplies. It would be too broad a reading of this section to infer that the federal government is thereby subjected to individual state *control* in the development and operation of federal reclamation projects.[48]

[7] (b) California also attempts to draw analogies to Section 5 of the Auburn-Folsom South Project Act, 43 U.S.C. § 616aaa—§ 616fff. This act generally provides for the construction of the Auburn Dam on the American River and for distribution facilities in downstream areas. The Auburn-Folsom South Project Act imposes specific obligations on federal officials, similar to those imposed in the New Melones Acts,[49] including: provision for power generation, 43 U.S.C. § 616aaa; flood control, 43 U.S.C. § 616bbb; recreation, 43 U.S.C. § 616ccc; fish and wildlife enhancement, 43 U.S.C. § 616ccc; protection of the needs of counties and watersheds in which the water originates, 43 U.S.C. § 616eee. Additionally, the Auburn-Folsom South Project Act imposes a further obligation on the Secretary of the

48. It should be noted that the Federal Water Supply Act also specifically provides that the act "shall not be construed to modify the provisions of" Section 8 of the 1902 Act. 43 U.S.C. § 390b(c).

49. See discussion of New Melones Authorizing Acts, *infra*.

Interior to "give due consideration" to California's water plan and to "consult" with local interests affected by the project, 43 U.S.C. § 616ddd.

Specifically, Section 5 of the Auburn-Folsom South Project Act provides as follows:

> "Nothing contained in [this Act] shall be construed by implication or otherwise as an allocation of water, and in the studies for the purposes of developing plans for disposal of water as herein authorized, the Secretary shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs."

Section 5 of the Auburn-Folsom Project Act mandates that the Secretary of the Interior shall make recommendations for the use of water in accord with State law *in the studies for the purposes of developing plans for the disposal of water as authorized by the Act*. It does not confer project control on the State of California.[50] [894]

[8] (c) It is also pointed out by California that the National Environmental Quality Improvement Act of 1970 (NEQIA) provides that the "primary responsibility for implementing this policy [for protection and enhancement of the national environment] rests with State and local governments." 42 U.S.C. § 4371(b)(2). California further indicates that the National Environmental Policy Act of 1969 (NEPA) states that federal agencies must cooperate with States and local governments in the achievement of environmental goals. 42 U.S.C. § 4331(a).

50. This reading is entirely consistent with the Congressional history of § 5 of the Auburn-Folsom South Project Act. See S.Rep. No. 1289, 88th Cong., 2d Sess., 3-4 (1964); H.R. Rep.No. 1826, 88th Cong., 2d Sess., 10 (1964).

The Congressional intent underlying both NEQIA and NEPA was to raise awareness of environmental concerns and provide a mechanism for the input of such concerns in the decision-making process. The "mechanism" to be employed is the Environmental Impact Statement. At least in the case of the New Melones Dam project, the Ninth Circuit Court of Appeals has already tested the sufficiency of the Environmental Impact Statement and has determined that environmental concerns were adequately considered. *Environmental Defense Fund, Inc. v. Armstrong,* 487 F.2d 814 (9th Cir. 1973), *cert. denied* 416 U.S. 974, 94 S.Ct. 2002, 40 L.Ed.2d 564 (1974). There is no indication that Congress intended either NEQIA or NEPA to either affirm or establish a policy of state control of the environmental aspects of federal reclamation projects.

[9] (d) The Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887, and the Flood Control Act of 1962, P.L. 87-874, 76 Stat. 1180, 1191, authorize the New Melones Project. California cites sections of these authorizing acts in support of its contention that states may exercise control over the development and operation of federal reclamation projects. California relies particularly on three aspects of these acts:

[1] The 1944 Act declares as follows:

> "[I]t is hereby declared to be the policy of the Congress to recognize the interest and rights of the states in determining the development of the water sheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers." 58 Stat. 887-88 (1944).

[2] The 1962 Act imposes specific obligations on federal government officials in operating the project including: giving priority to water needs within the Stanislaus River Basin before water is exported for use outside the basin, providing for the preservation and propagation of fish and wildlife, providing for the generation of electrical energy, and maintaining downstream water quality control. 76 Stat. 1191-92.

[3] The 1962 Act makes specific mention that states are not to control flood control aspects of the project, 76 Stat. 1191, and the 1944 Act specifically prevents state control with respect to water rights reserved for Indian reservations. 58 Stat. 891.

The authorizing act provisions cited by California, however, are entirely consistent with the concept of federal control of federal reclamation projects, coupled with federal-state development and coordination as to water uses. Coordination in the planning stage does not mean federal abdication or responsibility or control to state boards and agencies in the development and operation of federal reclamation projects. Further, the enumeration of specific federal obligations does not infer state control nor does the specific identification of exceptions to state control imply that other elements of project operation are to be placed within state control.

In summary, therefore, although the acts cited by California indicate a strong Congressional intention to include the [895] States and state law in the planning process and to ensure federal-state cooperation in projects, it cannot be said that these acts indicate by analogy or otherwise, a Congressional intention to abdicate the federal government's responsibility to develop and operate reclamation projects.

(4) Administrative Practice.

Although the Congressional history and judicial interpretation of Section 8 supports the legal posture of the United States, the State of California has urged this court to nevertheless consider the administrative practice of the Bureau of Reclamation vis a vis the state board. Certainly, when construing the meaning of a statute, it is pertinent and appropriate for a court to look to the administrative practice and interpretation placed on the statute by those charged with its administration. *Zemel v. Rusk,* 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). This rule of statutory construction is grounded in the belief that by statutory clarification Congress would presumably have altered any administrative interpretation which conflicts with the statute's intent.

The administrative practice of the Bureau of Reclamation is of some relevance in the present case. Both the United States and California have asserted to this court that this is a case of first impression and of national importance. If indeed this is true, as appears to be the case, then the administrative practice of the Bureau regarding the acquisition of water for federal reclamation projects has been an extraordinarily happy and tranquil practice which has somehow avoided the courts for three-quarters of a century since the enactment of Section 8. Such long-standing harmony would indicate that Congress was apparently satisfied that both the Bureau and the state boards were exercising authority within the allowable scope of Section 8.

The exhibits and affidavits on the subject of administrative practice have been primarily submitted by California. The Secretary of the Interior, the Commissioner of Reclamation. and the Regional Director of the Bureau of Reclamation have all been cited in these exhibits and affidavits. For example, California cites the 1944 statement submitted by the Regional Director of the Bureau, after consultation with the Secretary of the Interior and the Commissioner of Reclamation. This statement was quoted by the Supreme Court in *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 740, 70 S.Ct. 955, 94 L.Ed. 1231 (1950). The statement reads in pertinent part as follows:[51]

> "The Bureau of Reclamation does recognize and respect existing water rights which have been initiated and perfected or which are in the state of being perfected under State laws. The Bureau of Reclamation has been required to do so by Section 8 of the Reclamation Act of 1902 ever since the inception of the reclamation program administered by the Bureau of Reclamation. The Bureau of Reclamation has never proposed modification of that requirement of Federal law; and on the contrary, the Bureau of Reclamation and the Secretary of the Interior have consistently through the 42 years since the 1902 Act, been zealous in maintaining compliance with section 8 of the 1902 Act.
>
> They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws. Ample demonstration of the effect of this law and policy of administration, in action, has been given in connection with the Central Valley Project. Water filings made by the State have been obtained by the Bu- [896] reau of Reclamation by assignment, and vested water rights have been acquired by the United States, by purchase, the consideration amounting to millions of dollars and being agreeable to the vendors —all in conformity with state law."

---

51. Defendant's memorandum, p. 21, September 3, 1974.

In 1958, the Bureau repeated this view. The Bureau's Regional Director, in a letter to Representative Clair Engle of California, quoted from a letter of the Assistant Secretary of the Interior William E. Warne, as follows:[52]

> "As you know, the Sacramento Valley water rights are protected by: (1) Reclamation law which recognizes State water law and rights thereunder; (2) the State's counties of origin act, which is recognized by the Bureau in principle; and (3) the fact that Bureau filings on water rights are subject to State approval."

In 1950, Congress received a memorandum from the Commissioner of Reclamation entitled "Administrative Practice in Regard to Federal Appropriation of Water, a copy of which was also submitted to the Supreme Court in the *Gerlach* case. The Commissioner stated in pertinent part as follows:[53]

> "It is the practice of the Government to make appropriations of water from unnavigable streams in accordance with the provisions of state law (sec. 8, act of June 17, 1902, 32 Stat. 388).
>
> Before taking any steps toward the appropriation of water in any State, either by posting and recording notice of appropriations or filing application for permits to appropriate, full report as to the advisability of making such apropriation shall be submitted . .
>
> It appears from the foregoing that in practice the Department has generally regarded section 8 of the Reclamation Act of 1902 as directory of the course of action to be followed in its assertion of water rights

52. Defendant's memorandum, p. 22, September 3, 1974, quoting from 95 Cong.Rec. A961, 81st Cong., 2d Sess. (1948).

53. Defendant's memorandum, pp. 22-23, September 3, 1974, quoting Hearings on S. 1275 before the Subcommittee on Irrigation & Reclamation, Senate Comm. on Int. & Ins. Affairs, 88th Cong., 2d Sess., 311, 312, 320, 322, 323 (1964).

> for projects governed by the Federal Reclamation Laws and with respect to the recognition of rights under various State statutes and that it has followed the line marked out by that section regardless of whether the stream is navigable or nonnavigable.
>
> Public statements by officials of the Department of the Interior in recent years with the approval of the Department are in conformity with this practice.
>
> Whatever the correct theory be as to ownership of unappropriated water, the net effect as regards State laws is the same so far as the Bureau of Reclamation and its activities are concerned. This is true because of section 8 of the 1902 act. The Bureau of Reclamation and the Secretary of the Interior are required by that law to proceed in conformity with state water laws; they do so proceed; and they would strenuously oppose any change in the Federal law which now requires them to proceed in conformity with State water laws. Should the United States, in connection with the development of the Central Valley Project, as now or as it may be in the future authorized, desire to obtain or develop additional water supply for the project, it is and will be the intention and the clear policy of the Bureau of Reclamation and the Secretary of the Interior to obtain or develop the additional water supply by proceeding in conformity with the State law."

In 1952, Secretary of the Interior Oscar L. Chapman, wrote the following words in a letter to California Governor Earl Warren:[54] [897]

> "The State of California of course asserts a certain scope of jurisdiction of the water of the State and of its use, and by section 8 of the Reclamation Act of 1902 . . . Congress enjoined the Secretary of the Interior, in carrying out the provisions of the act, to

54. Defendant's memorandum, pp. 23-24, September 3, 1974, quoting from CVP Documents, Part 1, 810-812 (1956).

proceed in conformity with the State law. . . . The current estimate of the cost of the construction of the Central Valley Project is $700,000,000.00. The recoupment of the legally reimbursable portion of this Federal expenditure is necessarily dependent on a legal freedom, as well as a legally sanctioned duty, on the part of the United States to operate the project as it has been planned by both the State of California and the United States. This freedom in turn depends on the validity and extent of the rights of the United States to store, divert, and use water under the law of California. These rights have their inception in certain applications by the California Director of Finance to appropriate unappropriated water, which have been or are to be assigned by him to the United States, in certain applications made by the United States itself, and in already vested rights to the use of water which have been acquired by the United States from private parties through a negotiated purchase or inverse condemnation involving the payment of compensation."

The United States has not disputed the making of the statements cited by California, but rather has interpreted both their meaning and their relevancy differently than has California. The United States contends, *inter alia,* that the statements were all made prior to 1952 in a non-adversary proceeding and "are not likely to have the clarity one should look to to find the precise position of litigants,"[55] that the statements were all made prior to a number of very important court decisions which helped to define Section 8, and that in any case, the views expressed in the statements are entirely consistent with the notion that the

55. It is apparent, of course, that at least some of the statements were made after 1952.

federal government must comply with the *forms* of state law, but only on the basis of comity.[56]

As to the *actual* practice of the Bureau of Reclamation in California, affidavits have been submitted by California which assert that since 1938, the State Board has received 51 applications from the federal government to acquire water for various elements of the Central Valley Project. California notes that 41 of those applications were *conditionally* approved.[57] The United States does not dispute this, but asserts that it has consistently maintained to the State Board that it was appearing only for reasons of comity.[58]

[10, 11] In analyzing the statements and actions, two points are noteworthy. The Supremacy Clause of the United States Constitution is a limitation upon the states according to which federal law cannot be subordinated to state regulation within the areas of Congress' exclusive legislative powers. *People of the State of California ex rel State Water Resources Control Board v. Environmental Protection Agency,* 511 F.2d 963 (9th Cir. 1975). As noted earlier in this opinion, both parties to this action have admitted that because of the national implications inherent in reclamation, Congress could have afforded all power and control over federal reclamation projects to the federal government, giving no power and control to the states. See *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 294, 78 S.Ct. 1174, 2 L.Ed. 1313 (1958). California's position, however, is that the 1902 Act was a manifestation of Congress' intent to give [898] states certain

56. Plaintiff's memorandum, pp. 28-30, October 11, 1974.

57. Defendant's memorandum, p. 24, September 3, 1974.

58. Plaintiff's memorandum, p. 54, October 11, 1974. California does not dispute this assertion. See Defendant's memorandum, pp. 4-5, November 19, 1974.

powers in the operation and control of federal reclamation projects. To accept California's position, however, would require a finding that the 1902 Act waived exclusive federal jurisdiction. Waivers of exclusive federal jurisdiction, like waivers of sovereign immunity, are to be strictly construed. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *People of the State of California ex rel State Water Resources Control Board v. Environmental Protection Agency,* 511 F.2d 963 (9th Cir. 1975).

Secondly, this court must remain mindful of the admonition of the Ninth Circuit Court of Appeals in *Turner v. Kings River Conservation District,* 360 F.2d 184, 198 (9th Cir. 1966):

> ". . . [R]eason precludes an interpretation of the general provisions of Section 8 of the Reclamation Act [of 1902] . . . which would impute to Congress an intention to frustrate its plans for this project by subjecting it to the risk that it might never be used for some of the authorized purposes, should a state permit not be forthcoming."

Certainly, all the administrative pronouncements and actions cited above are susceptible to either the interpretation advanced by California or the interpretation advanced by the United States. Viewed, however, in the perspective of the Congressional history and judicial decisions relating to Section 8 previously cited in this opinion, this court is constrained to reject the interpretation advanced by California as being inconsistent with the Congressional history and those judicial decisions. On the other hand, all the administrative statements and actions are consistent with the view that the Bureau does and will

respect existing state water laws and further, that the Bureau does and will comply with state filing requirements *on the basis of comity.*

CONTENTIONS IN THE NATURE OF ESTOPPEL

As an alternative argument, California has raised several issues in the nature of estoppel against the United States. This alternative argument is grounded on the proposition that even if federal law precludes state control of federal reclamation projects in general, factors inherent in the instant case would estop the United States from contesting the authority of the State Board to issue Decision 1422. These contentions will be discussed seriatim.

(1) Equitable estoppel.

California contends that the United States should be equitably estopped from denying the authority of the Board, particularly as to Decision 1422, because the United States has consistently submitted to the Board or its predecessor, applications for permits to appropriate unappropriated water for the Central Valley Project.

California has cited the cases of *United States v. Georgia-Pacific Co.,* 421 F.2d 92 (9th Cir. 1970), *Brandt v. Hickel,* 427 F.2d 53 (9th Cir. 1970), and *Gestuvo v. District Director,* 337 F.Supp. 1093 (Cal. 1971), for the proposition that the United States cannot be estopped in its sovereign capacity, but can be estopped in its proprietary capacity. Such a distinction, however, is not the law in this circuit.

[12] Equitable estoppel may, under certain circumstances, be applied against the United States without regard to its "capacity", whether proprietary or sovereign. *United States v. Lazy FC Ranch,* 481 F.2d 985 (9th Cir.

1973). As the Ninth Circuit Court of Appeals stated in *Lazy FC Ranch*:[59]

> "[E]stoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by imposition of estoppel. . . . This proposition is true even if the government is acting in a ca- [899] pacity that has traditionally been described as sovereign . . . although we may be more reluctant to estop the government when it is acting in this capacity."

The test of estoppel applied in this circuit was outlined in *Georgia-Pacific* at 421 F.2d at 96: (a) the party to be estopped must know the facts; (b) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (c) the latter must be ignorant of the true facts, and (d) he must rely on the former's conduct to his injury.

[13] If in fact there is a legitimate disagreement between the United States and California as to the true nature of their relationship regarding the acquisition of water to develop federal reclamation projects, then it can hardly be said that the United States "knew" the true facts and thereby "induced" California to engage in detrimental conduct. Further, this court is doubtful whether the expenditure of time and effort by the State Board in the conduct of hearings can rise to the level of "injury" envisioned by the equitable estoppel doctrine.

(2) *Res judicata* and collateral estoppel.

California Water Code § 1360 provides that any person interested in any application for a permit to appropriate water may within 30 days after final action by the Board

59. 481 F.2d at 989.

file a petition for a writ of mandamus in the Superior Court to inquire into the validity of the Board's action. California Code of Civil Procedure § 1094.5 provides for the mechanism and procedures on review of administrative actions.

At no time did the United States seek a direct appeal of Decision 1422 to the California courts. Rather, the United States initiated the instant declaratory relief action in federal court. This failure to pursue California's mandamus provisions, argues California, makes Decision 1422 *res judicata* and, through the doctrine of collateral estoppel, prevents attack in this Court on issues and matters decided by the Board in Decision 1422.

[14] The doctrines of *res judicata* and collateral estoppel rest upon considerations of economy of judicial time and the public policy favoring the establishment of certainty in legal relations. The doctrine of *res judicata* has a double aspect: (1) it precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction; and (2) any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies in a subsequent lawsuit on a different cause of action. The latter aspect of *res judicata's* double nature is more properly called collateral estoppel. *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948); *Teitelbaum Furs, Inc. v. Dominion Insurance Co., Ltd.* 58 Cal.2d 601, 604, 25 Cal.Rptr. 559, 375 P.2d 439 (1962).

[15] Both the *Sunnen* case and the *Teitelbaum* case indicate, however, that a primal and essential element necessary for *res judicata* and collateral estoppel is that the court in the first action be a "court of competent jurisdiction". The rendition of a judgment without jurisdiction is a usurpation of power and makes the judgment void. 46

Am.Jur.2d Judgments § 22 (Bancroft-Whitney 1969). Before a judgment may operate as a conclusive determination of a cause of action, or of the issues litigated therein, it is necessary that it should have been rendered by a court of competent jurisdiction of the parties and of the subject matter or cause of action. 46 Am.Jur.2d Judgments § 446 (Bancroft-Whitney 1969). In dealing with an assertion of *res judicata* and its progeny collateral estoppel, this court may consider whether the subject matter, the issues and the character of the judgment rendered were of a class within the scope of the powers of the Board. 46 Am.Jur.2d Judgments § 446 (Bancroft-Whitney 1969).

[16] It is apparent from the previous discussion of Section 8, that the [900] Board acted *ultra vires* its authority vis a vis the Bureau. In a very real sense the Board has no jurisdiction over the Bureau, but may only, because of comity be asked to determine the availability of unappropriated water. As to the Bureau, the Board is not a "court of competent jurisdiction", but rather, once a determination has been made that unappropriated water is available, the Board functions in a purely ministerial manner in issuing permits to the Bureau. Where the Board seeks to do more than make the determination of availability of unappropriated water and, as in the instant case, attempts to impose terms and conditions on the granting of a permit to appropriate water for a federal reclamation project, the United States need not pursue California appellate remedies, but rather, could appropriately turn to a federal court in a declaratory relief action for the purpose of interpreting and clarifying federal law.

(3) Effect of Decision 1422.

As a concomitant to its estoppel arguments, California has asked this court to conclude as a matter of law that

Decision 1422 does not materially alter or conflict with the purposes of the New Melones Project. This contention is based primarily upon the reasoning that the United States will be allowed to acquire additional water for the project once it is able to show a need for additional water and once it develops a specific plan for the use of such water. California's argument in this regard is that Decision 1422 does not prevent the fulfillment of the project's purposes, but instead merely temporarily denies a part of the water sought by the United States until it can show a specific and identifiable need for the water.

The United States has strenuously argued that the conditions and terms sought to be imposed by Decision 1422 do in fact alter or conflict with the purposes of the New Melones Project.

[17] It appears to this court, however, that the question of the effect of Decision 1422 on the purposes of the New Melones Project is simply not material to the disposition of this case. As this opinion has previously noted, the "jurisdiction" of the Board in regard to the construction and operation of federal reclamation projects—once those projects have been approved—extends only so far as the determination of the availability of unappropriated water. Beyond that point, the Board has no jurisdiction. Therefore, *any* conditions or terms imposed by the Board must be considered *ultra vires* and "in conflict" with the purposes of the federal reclamation project.

(4) Public Policy.

Finally, California contends that if the United States prevails in its position, California will have no voice whatsoever in the use of its waters stored at federal reclamation projects, and this would be against the public interest of the people of California.

This contention ignores several basic facts. As an initial matter, California itself authorized the Central Valley Project through the Central Valley Project Act of 1933, Cal.Stats. Ch. 1042. Thereafter, California actively solicited federal monies and support for the development of the CVP and the New Melones Project. As recently as last year, the California electorate voted in favor of contnued development of the New Melones Project.[60] California has not contended that its input was not sought or that its law was not consulted in the planning process of the New Melones Project.

When speaking of the public interest of the people of California, it is useful to keep this case in perspective. This court does not view this case as a confrontation between environmentalists and conservationists on the one hand versus industrial, agricultural and municipal [901] water users on the other. The primal question before this court is one of state versus federal power as to the operation and control of federal reclamation projects. It is the sort of case which inevitably arises in the multiple sovereignty of a federal system of government. As such, this court must consider not only the public interest of the people of California as Californians, but also as citizens of the United States.

APPROPRIATENESS OF SUMMARY PROCEEDINGS

California's motions for judgment on the pleadings and for summary judgment are grounded on the premise that the case involves interpretations of federal law and therefore the issues in the case are legal, rather than factual. The question presented by a motion for judgment on the

60. During the 1974 California Primary, California voters rejected Proposition 17, the so-called "Deliver the River" Proposition which would have required the State of California to seek stoppage of the New Melones Project.

pleadings pursuant to F.R.C.P. 12 is solely one of law and, if an issue of fact is raised by the pleadings, the motion must be denied. Summary judgment, pursuant to F.R.C.P. 56, is only appropriate where there are no material facts in dispute and a party is entitled to judgment as a matter of law.

From the face of the complaint itself, issues of fact are raised[61] and thus in a technical sense, judgment on the pleadings is inappropriate.

Notwithstanding that issues of fact are raised on the face of the complaint, this court agrees with California that no *material* fact is in dispute. This court further agrees with California that this case involves legal questions concerning which judgment can be granted as a matter of law. Accordingly, summary judgment is appropriate. However, as this opinion has indicated, judgment is appropriate for the United States, a non-moving party. The question thus arises: Can summary judgment be granted in favor of a non-moving party?

[18] It would seem that where, as in the instant case, both parties have been afforded a full and fair opportunity to present their case, and where summary judgment is appropriate, a court should grant summary judgment to a non-moving party without the formality of a cross-motion for summary judgment.[62] See *Hennessey v. Federal Security Administrator*, 88 F.Supp. 664 (Conn. 1949); *Local 453 v. Otis Elevator Company*, 314 F.2d 25 (2d Cir. 1963).

61. For example, the complaint asks this court to find that the conditions and terms imposed by Decision 1422 conflict with the construction and operation of the New Melones Project.

62. It should be noted that California has consistently admitted in its pleadings and in open court that should this court find against it as a matter of law, then summary judgment would be appropriate for the non-moving party, the United States.

[19] There is no doubt that summary judgment is applicable to a proceeding for declaratory relief. 6 Moore's Federal Practice § 56.17 [19] (1974). Accordingly:

Declaratory judgment is entered as follows:

(1) The United States can appropriate unappropriated water necessary for use in any federal reclamation project within the State of California, but must first, in accordance with comity, apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water;

(2) When the United States submits applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available;

(3) Nothing contained in Section 8 of the 1902 Act or in any other presently existing federal law, regulation or administrative directive allows the California Water Resources Control Board to impose any terms or conditions in permits issued to the United States as a result of applications to the Board by the United States for allocations of unappropriated water;

(4) Decision 1422 is void in all respects where it attempts to impose terms and conditions of any kind upon the ac- [902] quisition by the federal government of unappropriated waters as said terms and conditions may relate to the control, development or operation by the federal government of the New Melones Project.

California's motion for summary judgment is denied and summary judgment is granted for the United States in accordance with the views expressed in this opinion.

It is so ordered. [903]

Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

APPENDIX (VOLUME II)

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 19, 1977
CERTIORARI GRANTED DECEMBER 2, 1977

DOBB PRINTING COMPANY OF CALIFORNIA, 343 FIRST STREET, SAN FRANCISCO 94105

APPENDIX (VOLUME II)

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United States of America v. State of California, et al.,

Eastern District of California, No. S-3014.

DEFENDANTS' EXHIBIT 1
AFFIDAVIT OF BILL B. DENDY

Bill B. Dendy, being first duly sworn, deposes and says:

1. I am the Executive Officer of the State Water Resources Control Board, and as such have supervision and control over the official documents and records of the State Water Resources Control Board.

2. The exhibits attached hereto are true and correct copies of official records and documents maintained in the files of the State Water Resources Control Board, and are identified as follows:

Exhibit No.	Description
2	Decision 1422.
3-A	Application No. 14858.
3-B	Application No. 14859.
3-C	Application No. 19303.
3-D	Application No. 19304.
4	Petition for Assignment of Applications Numbers 14858 and 14859.
5	Decision 935, page 64.
10	Administrative Reporter's Transcript, Hearing of State Water Resources Control Board re Decision 1422.
11	Briefs submitted by parties in hearing of State Water Resources Control Board re Decision 1422.
12	Exhibits filed by parties in hearing of State Water Resources Control Board re Decision 1422 (partial list).

3. Since 1927, the United States has submitted to the State Water Resources Control Board, or its predecessors, at least 29 applications for permits to appropriate water from the Central Valley Project. At least 20 additional applications for permits [1] to appropriate water from the Central Valley Project have been assigned to the United States, and a request for assignment of two additional applications for permits to appropriate water for the Marysville Dam project has been submitted but not yet approved. Forty-one of these applications have been approved, most conditionally, but adoption of Decisions 893, 935, D-990, 1020, 1100, 1250, 1308, 1356, 1361, and 1422, by Permit Order 124, and an unnumbered Permit Order adopted July 28, 1960. To date, two licenses and 39 permits have been issued as a result of the aforementioned applications, three of the applications have been cancelled, and seven applications are still pending. One of the permits issued includes only storage so that the direct diversion feature is also still pending.

4. The processing of the above applications has resulted in several hearings conducted by the State Water Resources Control Board and its predecessors, commencing in 1957 and extending over several years. These hearings have consumed a substantial portion of the time and attention of the State Water Resources Control Board and its predecessors. Many parties who use water for various purposes, including agricultural, municipal and industrial use, and many parties who assert environmental interests, have offered evidence or otherwise participated in those hearings.

5. The application numbers, permit numbers, if any, sources, and purpose of use on the aforementioned applications submitted by the United States, which have been

approved, conditionally or otherwise, by the State Water Resources Control Board and its predecessors are as follows:

Application	Permit	Source	Purpose of Use
10588	12728	Sacramento R	Power
13370	11315	American R	Irrigation, etc. [2]
13371	11316	American R	Municipal, etc.
13372	11317	American R	Power
14662	11318	American R	Power
15374	11968	Trinity R	Municipal, etc.
15375	11969	Trinity R	Irrigation, etc.
15376	11970	Trinity R	Power
15424	19957	Clear Creek	Power
16767	11971	Trinity R	Irrigation, etc.
16768	11972	Trinity R	Power
17374	11973	Trinity R	Irrigation, etc.
17375	12365	Clear Creek	Power
17376	12364	Clear Creek	Irrigation, etc.
18721	16209	N.Fk.American R	Irrigation, etc.
18723	16210	N.Fk.American R	Power
19303	16599	Stanislaus R	Power
19304	16600	Stanislaus R	Irrigation, etc.
20350	16182	American R	Municipal, etc.
21542	15149	Old River	Power
21636	16211	N.Fk.American R	Power
21637	16212	N.Fk.American R	Irrigation, etc.
22316	15735	Rock Slough	Irrigation, etc.

6. The application numbers, permit numbers, if any, sources, and purposes of use on the aforementioned applications assigned to the United States by other parties, in order to allow the United States to acquire priority, are as follows:

Application	Permit	Source	Purpose of Use
23	11986	San Joaquin R	Irrigation, etc.
234	11885	San Joaquin R	Irrigation, etc.
1465	11886	San Joaquin R	Irrigation, etc.
5625	12720	Sacramento R	Power
5626	12721	Sacramento R	Irrigation, etc. [3]
5627	11966	Trinity R	Power
5628	11967	Trinity R	Irrigation, etc.
5638	11887	San Joaquin R	Irrigation, etc.
9363	12722	Sacramento R	Municipal, etc.
9364	12723	Sacramento R	Irrigation, etc.
9365	12724	Sacramento R	Power
9366	12725	Rock Slough	Irrigation, etc.
9367	12726	Rock Slough	Municipal, etc.
9368	12727	Old River	Irrigation, etc.
13892	—	Italian Slough	Irrigation, etc.
14858	16597	Stanislaus R	Irrigation, etc.
14859	16598	Stanislaus R	Power
15764	12860	Old River	Irrigation, etc.
18115	13776	Stony Creek	Irrigation, etc.
20245	—	Old River	Municipal, etc.

7. To the best of affiant's knowledge, neither the United States, nor any agency or official thereof has filed a mandamus proceeding to seek judicial review of Decision 1422 pursuant to the provisions of Water Code Section 1360, within the time prescribed by California law or at any other time.

/s/ Bill B. Dendy
Bill B. Dendy, Executive Officer
State Water Resources Control Board

Sworn to before me this 21 day
of August, 1974.
/s/ Gail F. Draper
Notary Public [4]

DEFENDANTS' EXHIBIT 2

NEW MELONES PROJECT WATER RIGHTS DECISION

DECISION 1422

In the Matter of Applications 14858, 14859, 19303 and 19304 to Appropriate from the Stanislaus River in Calaveras and Tuolumne Counties.

U.S. Bureau of Reclamation,
Petitioner and Applicant

STATE WATER RESOURCES CONTROL BOARD

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State of California
State Water Resources Control Board
Decision 1422

In the Matter of Applications 14858, 14859, 19303 and 19304 to Appropriate from Stanislaus River in Calaveras and Tuolumne Counties.

U. S. BUREAU OF RECLAMATION,
Petitioner and Applicant

DECISION GRANTING PETITION FOR ASSIGNMENT OF APPLICATIONS AND APPROVING APPLICATIONS IN PART

By the Board:

U. S. Bureau of Reclamation, hereinafter referred to as "Bureau" having filed a petition for assignment of Applications 14858* and 14859 and having filed Applications 19303 and 19304 for permits to appropriate unappropriated water; protests having been received; a public hearing having been held before the State Water Resources Control Board commencing on October 26, 1972; applicant, protestants and other persons having appeared and presented evidence; the evidence received at the hearing having been duly considered, the Board finds as follows:

Substance of the Applications

1. (a) Application 14858 is for a permit to appropriate 8,800 cubic feet per second (cfs) by direct diversion, [1]

*Applications 14858 and 14859 were originally filed by the Department of Finance pursuant to Water Code Section 10500 and were subsequently transferred to the State Water Resources Control Board pursuant to Water Code Section 10504. The Bureau has filed a petition for assignment of these applications which petition includes proposed completed applications which petition includes proposed completed applications in its name as required by Water Code Section 10504 and board rule (California Administrative Code, Title 23, Section 800).

year-round, and 980,000 acre-feet per annum (afa) by storage to be collected from October 1 of each year to July 1 of the succeeding year for irrigation, domestic, municipal, industrial, fish culture, recreation and water quality purposes from the Stanislaus River in Calaveras and Tuolumne Counties.

(b) The foregoing information is identical in Application 14859 except that its purpose of use is power generation.

(c) Application 19303 is for a permit to appropriate 6,000 cfs by direct diversion and 2,400,000 afa by storage, both year-round for power generation from Stanislaus River in Calaveras and Tuolumne Counties.

(d) Application 19304 is for a permit to appropriate 2,250 cfs by direct diversion and 2,400,000 afa by storage, both year-round, for irrigation, domestic, municipal industrial, fish culture, recreation and water quality control purposes from the Stanislaus River in Calaveras and Tuolumne Counties.

The primary point of diversion under all four applications is at the proposed New Melones Dam which will be located within the SW¼ of SW¼ of Section 11, T1N, R13E, MDB&M, on the Calaveras County-Tuolumne County boundary line. A proposed Knights Ferry diversion dam which will be located downstream from New Melones Dam within the SW¼ of NE¼ of Section 21, T1S, R12E, MDB&M is also listed as a point of direct diversion under Applications 14858 and 19304. [2]

Applicant's Project

2. The U. S. Corps of Engineers has under construction a multipurpose project, known as New Melones, on the Stan-

islaus River approximately 35 miles northeast of the City of Modesto. The principal feature of the project will be a dam to be constructed approximately three-quarters of a mile downstream from the present Melones Dam and reservoir which has a capacity of 112,000 acre-feet. The new reservoir will have a capacity of 2,400,000 acre-feet and will inundate the existing dam and reservoir. The New Melones project will be operated and maintained by the Bureau and it will be an integrated part of the Central Valley Project (CVP).

The proposed place of use for water conserved by the project, as amended by petition submitted November 16, 1972, includes all of Calaveras, Tuolumne, Stanislaus, San Joaquin and Contra Costa Counties along with the remainder of the CVP service area in San Joaquin and Santa Clara Valleys. The portions of this area which will actually be served with water have not been more specifically identified. The Bureau's economic analysis of the project assumes that some water will be used in the Kaweah River area within the San Joaquin Valley (Staff Exh. 12, p. 8). This would require the construction of conveyance facilities that have not as yet been authorized by Congress. The act of Congress authorizing the project requires that the Stanislaus River basin be given preference in the use of project water. [3]

The project will provide flood protection to approximately 35,000 acres of highly developed agricultural land in the flood plain of the Stanislaus River and to the suburban areas of Ripon, Oakdale and Riverbank. In conjunction with other works it will provide flood protection to agricultural lands along the San Joaquin River and to agricultural lands within the Sacramento-San Joaquin Delta and to suburban areas south of the City of Stockton (RT 25).

The project also will provide water for water quality control and fish and wildlife preservation and enhancement along the Stanislaus River, lower San Joaquin River and possibly provide additional water for water quality control in the Delta (RT 27). Under the terms of an agreement with the California Regional Water Quality Control Board, Central Valley Region, the Bureau has agreed to release up to 70,000 acre-feet of the annual conservation yield of the reservoir to meet water quality objectives.

The project will have power facilities installed immediately below the dam which will consist of two 150 megawatt generators.

Protests to Applications

3. Protests to the applications were filed by numerous individuals, companies, reclamation districts, irrigation districts and other public agencies. Most of the protestants now have no objection to the project and some of the original protestants actually support it. Their principal concern is in the [4] manner in which the project will be operated, particularly in respect to protection of downstream rights, meeting water quality objectives, location of the areas to be served by the project and the purposes for which the water will be used.

Protestants Oakdale and South San Joaquin Irrigation Districts, Tuolumne County Water District No. 2 and Calaveras County Water District have withdrawn their protests to the applications following agreement with the Bureau (USBR Exh. 37; TCWD No. 2 Exh. 1). Any permits issued pursuant to subject applications should be made subject to these agreements.

Protestants Contra Costa County Water Agency, et al in their brief persist in the position taken during the hearing that Board action on the subject applications should be held in abeyance until the Bureau agrees to abide by any permit terms that may be contained in any permits issued pursuant to the applications. A motion to this effect made during the hearing was properly denied.

Protestants Delta Water Agency, Delta Water Users Association, San Joaquin County Flood Control and Water Conservation District, Banta Carbona Irrigation District, Stanislaus River Flood Control Association, Stockton-East Water District and McMullin Reclamation District, et al support the New Melones Project and are in substantial agreement as to special terms to be included in any permits that may be issued. Requested special permit terms are: a term limiting the entire yield of the project to use in Calaveras, Tuolumne, Stanislaus and San Joaquin Counties; [5] terms imposing more stringent standards for the protection of water quality in the lower San Joaquin River and Delta for an interim period, the Board retaining jurisdiction in the matter; a term retaining jurisdiction by the Board over fishery flows; a term retaining jurisdiction by the Board in respect to points of rediversion; and a term subjecting the permits to vested rights (a standard permit term). Also requested to be included is a term that would insure that landowners downstream from the dam will receive the flood control benefits for which the project was authorized and a term requiring the Bureau to promptly negotiate with users of water from the Stanislaus River concerning protection of their existing water rights, with the Board reserving jurisdiction over any permits until it does so; however, these are matters not within the Board's authority. Any permits issued will be subject to all prior rights and will not authorize any interference with such rights.

Protestant Department of Fish and Game has recommended greater releases of water for fishlife than those proposed by the Bureau. It also recommends the acquisition of the remaining riparian habitat along the lower portion of the Stanislaus River for the protection of wildlife; that steps be taken to mitigate destruction of wildlife within the reservoir area; and that the Board retain continuing jurisdiction in the matter of fish releases until further information is obtained (F & G Brief, p. 6).

Protestant Environmental Defense Fund contends the Bureau has failed to justify a project of the magnitude planned [6] and has failed to show that the water will be placed to beneficial use within a reasonable time. It recommends that the applications and petition for assignment of State filings be denied, particularly in view of the adverse effect the project will have on the environment of the area and on whitewater boating.

Protestant Sierra Club contends that there is no water available from the Stanislaus River and lower San Joaquin River for the out-of-basin uses as contemplated by the Bureau, and that the Bureau is not in a position to place the water covered by the permits to beneficial use within a reasonable period of time. It also recommends that the applications and petition for assignment of State filings be denied.

Water Supply

4. The watershed of the Stanislaus River above the proposed New Melones Dam varies in elevation from 1,088 feet to over 10,000 feet at the crest of the Sierra Nevada. The total drainage area is approximately 900 square miles. The annual rainfall averages approximately 27 inches at the damsite and 65 inches in the upper portion of the watershed.

The estimated unimpaired annual flow in the Stanislaus River at Melones Dam has been as low as 261,000 acre-feet and as high as 2,356,900 acre-feet (USBR Exh. 27). The average annual unimpaired flow is approximately 1,100,000 acre-feet (Staff Exh. 12, p. 34).

Oakdale and South San Joaquin Irrigation Districts divert most of the flow of the Stanislaus River other than flood [7] flows into their main canals at Goodwin Dam approximately 12 miles downstream from New Melones. As a result, the river is frequently dry immediately below Goodwin Dam during the summer months.

Water Requirements of Users Holding Prior Rights

5. Oakdale and South San Joaquin Irrigation Districts are the major holders of prior rights to the water from Stanislaus River. They constructed the present Melones Reservoir approximately 45 years ago and in 1957 they completed Tulloch, Donnells and Beardsley Reservoirs known as the Tri-Dam Project. Donnells and Beardsley Reservoirs are on the upper middle fork of the Stanislaus River and Tulloch Reservoir is located on the main stem of the river several miles below Melones Reservoir. The total capacity of the three reservoirs is 230,400 acre-feet. During the period of 1914-1970 the districts' diversions of water from the Stanislaus River under all claims of right have varied from approximately 204,000 acre-feet in 1924 to a high of 597,300 acre-feet in 1962 with an average annual diversion of 409,500 acre-feet. Under the agreement providing for the dismissal of the districts' protests, the Bureau will deliver all of the inflow of the New Melones Reservoir up to 654,000 acre-feet in each year for rediversion at Goodwin Dam in satisfaction of the districts' prior rights.

The ultimate annual demand for Stanislaus River water below Goodwin Dam has been calculated to be 74,500 acre-feet under active and dormant riparian rights, appropriative rights including all applications on file with the Board as of the [8] year 1972, and approximately 9,000 afa for undefined "other rights" (USBR Exhs. 33, 34). All of these uses are by direct diversion with a season that generally extends from March through October (USBR Exh. 19). The Bureau's proposed project could not harm these users during the July through October period as no water is available for the project during that period. Accretions to the river between Goodwin Dam and its mouth will be sufficient to cover rights in that area during the March through June period. A comparison of the records of a gaging station just below Goodwin Dam with a station near the mouth of the river for the months of March through June during the period 1963-1968 indicates an average accretion of 47,440 of USBR (Exhs. 12 and 15). The estimated average ultimate annual requirements of the downstream users during March through June is 35,118 acre-feet. (USBR Exh. 34).

The Stanislaus River watershed upstream from the site of the New Melones Dam includes portions of Alpine, Tuolumne and Calaveras Counties. Use of water from the Stanislaus River in Alpine County is mostly on U. S. Forest Service land and the anticipated demand for water in the county is included in a 2,000 afa allocation by the Bureau for use in the Sanislaus National Forest. Calaveras County Water District holds numerous permits to appropriate water for the development of the Stanislaus River basin. Tuolumne County Water District No. 2 also has undeveloped rights to water in the upper Stanislaus basin. The Bureau has estimated the actual yield of the upstream

rights of both counties to be 312,000 afa by storage and 1,739 cfs by [9] direct diversion (USBR Exh. 31; RT 64). The agreements between the Bureau and Calaveras County, Calaveras County Water District and Tuolumne County Water District No. 2 provide that the Bureau will recognize the prior rights of the counties of origin to divert water from the upper basin as required for their needs. Provision is also made for the counties to contract for a water supply from the yield of New Melones (CC Exh. 1; TCWD Exh. 1).

Availability of Unappropriated Water

6. The Bureau's conclusion as to the extent that water in the Stanislaus River remains unappropriated is based upon its estimate of the unimpaired inflow to the New Melones site for a hydrologic cycle equivalent to the period 1923 through 1953. After deducting the quantity of water necessary for the above-described demands the annual average surplus is an estimated 335,000 acre-feet and varies from zero which occurs in nine years of the period of study to 1,980,000 acre-feet.

The Bureau's Exhibit 32a shows no unappropriated water during the month of October and that month should be eliminated from the diversion season specified in any permits to be issued. Diversion during the months of July through September is precluded by past decisions of the Board, and should also be excluded from the permits.

Unappropriated water is available to supply the Bureau, and, subject to suitable conditions, such water may be diverted and used in the manner proposed without causing any substantial injury to any lawful user of water. [10]

Water Quality

7. The Stanislaus River contributes approximately 25 percent of the annual flow of the San Joaquin River as measured at the USGS gaging station "at Vernalis" and approximately 15 percent of the July through October flow (USBR Exh. 45). The gaging station is just below the confluence of the two rivers. Most of the summer flow in the lower San Joaquin River consists of irrigation return water. The total dissolved solids (TDS) exceed 500 parts per million (ppm) approximately 38 percent of the time during the irrigation season (USBR Exh. 42; RT 235). The Stanislaus River is an important source of dilution water required to reduce the TDS in the lower San Joaquin River to usable levels (Staff Exh. 11, pp. 13, 15, 27).

The Bureau under its agreement with the California Regional Water Quality Control Board, Central Valley Region, plans to release up to 70,000 acre-feet of water in any one year as required to maintain a mean monthly TDS concentration in the San Joaquin River below the mouth of the Stanislaus River at 500 ppm maximum, also to maintain at least five ppm of dissolved oxygen (DO) in the Stanislaus River (Staff Exh. 13). The Bureau estimates that the DO requirement can be met in 10 out of 11 years, assuming a 1975 level of development, with a water quality release averaging 15,520 afa. These releases will be in addition to the Bureau's planned fish releases which amount to 98,000 acre-feet in a normal year. Releases required to meet these water quality objectives would not exceed 70,000 acre-feet maximum until about year 2075 according to a report written by the U. S. Public Health Service (Staff Exh. 11, Table A-4, p. A-12). [11]

However, the ability of the agreed-upon releases to accomplish the water quality objectives depends upon the assumption that the mean TDS concentration of water released from New Melones will be 50 ppm and that the relationship between flows and TDS at Vernalis established by the U. S. Public Health Service (Staff Exh. 11) will continue. These assumptions may not be valid. TDS levels up to 175 ppm have been recorded prior to the construction of the Tri-Dam Project. Also, evaporation at New Melones Reservoir and return flows from future developments upstream could increase salt levels. Only meager data has been presented by the Bureau concerning the flow versus TDS concentrations in the earlier years. There is little basis for concluding that the flow versus TDS relationship at Vernalis is stable on a long-term basis. Also, a problem in predicting the effect of releases of project water on water quality is the failure of the Bureau to specifically designate the place and method of using the conservation yield of the project.

There was considerable evidence presented at the hearing as to what are proper water quality objectives. The Department of Fish and Game has requested a minimum DO of 7 ppm to protect the salmon fishery (RT 526). The Board's Interim Water Quality Control Plan, San Joaquin Basin 5C, specifies that as a result of waste discharges the DO in the Stanislaus River should not fall below 85 percent of the saturation value, which is more restrictive than the DO standard of 5 ppm agreed upon by the Bureau. Protestants Delta Water Agency and Banta-Carbona [12] Irrigation District recommend that the maximum total dissolved solids at Vernalis be 450 ppm at a 14-day running average (RT 911). If these objectives had been met during the

years 1950 through 1969 the Bureau's proposed limit of 70,000 afa would have been exceeded in ten out of the twenty years. (DWA Exh. 24).

In view of the uncertainty inherent in the problem of proper releases to protect water quality, any permits issued pursuant to subject applications should contain an interim term until further studies are made requiring releases of conserved water from New Melones which will maintain a mean monthly TDS concentration in the San Joaquin River at Vernalis of 500 ppm or less and a DO concentration in the Stanislaus River as specified in the Interim Water Quality Control Plan. The Board should reserve jurisdiction over the permits for the purpose of revising water release requirements for water quality objectives.

Consumptive Use of Project Water

8. The Bureau has described the following areas within which the conservation yield of the New Melones Project may be used for irrigation or other consumptive purposes; the local service area consisting of Tuolumne, Calaveras, San Joaquin and Stanislaus Counties; southern San Joaquin Valley via the proposed East Side Canal or a Cross Valley Canal; San Felipe division of the CVP; San Luis unit of the CVP; the area served by the Delta Mendota Canal; the Montezuma Hills Unit of the CVP; and the Suisun Marsh area. [13]

The entire service area which the Bureau has designated as the place of use includes over 11,000,000 acres of land.

There is a future need for additional water supplies in one or more of the above areas. However, the Bureau has presented no specific plan for applying project water to beneficial use for consumptive purposes at any particular

location. Furthermore, the record shows that the CVP has substantial quantities of water that are not being used and are not under contract. The Bureau's own records indicate that without the yield of the New Melones Reservoir the Bureau can meet the estimated buildup of demands under present contracts for a long period of years (USBR Exh. 46 with supplements).

While the Bureau may not be "up to its ears in water" as suggested by Protestant Environmental Defense Fund (EDF Brief, p. 5), there certainly has been no demonstrated need for the additional water supplies developed by this project, outside of the local area. Two aspects of this part of the Bureau's case as to the need for water are disturbing; although this decision is in no way dependent upon the information in question, our concerns will be mentioned.

The effort of the Bureau to obfuscate the effect on the applicant of this Board's Decision 1379 is one of them. The Bureau has stated that its share of the additional Delta outflow required to meet the requirements of Decision 1379 would be 2.2 million afa (RT 186). It has also stated that this amount would be reduced to 1.6 million afa with the Peripheral Canal only, and 1.1 million afa with both the Peripheral Canal and Delta Overland Facilities (USBR Exh. 46). It is our understanding that export of water from the Delta during minimum flow periods in the full amount [14] contemplated by the State and Federal Projects cannot be accomplished without the Peripheral Canal or equivalent facilities (DWR Exh. 502; Staff Exh. 502B, Delta Hearing). Therefore, the significance of the oft-mentioned 2.2 million afa is not apparent.

We are also concerned that the increase in uncommitted yield of the CVP, due to less than expected demand of Sacramento River users, was disclosed more or less as extraneous information, rather than as an integral part of the planning data (RT 745 et. seq.).

By failing to present evidence of a specific plan to use the water conserved by the New Melones Project for consumptive purposes, the Bureau has failed in spirit if not in substance to meet the statutory requirements for approval of a permit to appropriate water for such purposes. While this Board, in the past, has consistently recognized the need to operate facilities of the Central Valley Project in an integrated manner (see Decisions 893, 990, 1356), the law requires the Board to examine each application and determine that the water to be appropriated will be placed to beneficial use (Water Code Sec. 1240). In addition, the specific intended use must be evaluated and found to be reasonable, beneficial and *in the public interest* before a permit can issue. The Board undertakes a balancing of competing demands and policy considerations and has broad discretion (Water Code Sec. 1257, *Temescal Water Co.* v. *Dept. of Public Works*, 44 Cal. 2d 90, 280 P. 2d 1). [15]

The record contains substantial evidence that the full conservation yield of the New Melones Project, and more, will eventually be needed in Tuolumne, Calaveras, San Joaquin and Stanislaus Counties (RT 145-147, 1131). These four counties include substantial areas in the Stanislaus River basin and are considered by the Bureau to be entitled to preference in the use of project water, based on the provisions of Public Law 87-874 and the California County of Origin Law (Water Code Sec. 10505) (RT 144). The Board agrees, as explained later in this decision.

The limited unappropriated water resource of the State should not be committed to an applicant in the absence of a showing of his actual need for the water within a reasonable time in the future. When the evidence indicates, as it does here, that an applicant already has a right to sufficient water to meet his needs for beneficial use within the foreseeable future, rights to additional water should be withheld and that water should be reserved for other beneficial uses. In this case, existing surplus supplies that are available to the Bureau should be utilized before storage is allowed in New Melones Reservoir to satisfy demand for more water in service areas outside of the four basin counties.

Although the full conservation yield of the project will be required for future development of the four basin counties, no facilities have been planned up to now to serve [16] project water in these counties and no contracts have been negotiated for such service. The record is not clear how soon water user agencies will be ready to execute any such contracts.

The lack of evidence that New Melones Project water will be needed for consumptive use outside the four basin counties for many years to come, if ever, or that it will be used within those counties at any definite time in the future, raises substantial doubt whether permits should be issued to impound more water in New Melones Reservoir, at least at this time, than is needed for satisfaction of prior rights and non-consumptive purposes—protection and enhancement of fish and wildlife, water quality, recreation and generation of power.*

*Permits to impound water for flood control are not required and were not requested.

To help resolve this doubt the Board must consider any adverse consequences of such impoundment. The proposed reservoir would inundate approximately 13 miles of river upstream from the existing Melones Reservoir, including approximately 9 miles above Parrotts Ferry Bridge now being used for whitewater recreation. Any storage of water above the levels of the existing Melones Reservoir will conflict with use of the upper reach for whitewater boating, stream fishing, and other stream-related activities.

Protestant Environmental Defense Fund estimates that in the year 1971 use of the river for whitewater recreation amounted to over 23,000 visitor days and that such use may eventually increase to 90,000 visitor days per year (EDF Exh. 1; RT 1059). It has been estimated that visitors using the services [17] of commercial river runners spent approximately $730,500 in 1971. The project's recreational features would not adequately substitute for the present recreational uses of the river in the upstream reach. A study by the Water Resources Council indicates that the New Melones site does not lie within one of the regions which will require additional reservoir recreation areas by the year 2020 (EDF Exh. 7). There are numerous other reservoirs already in the same region (EDF Exh. 6); further, a lake fishery is not adequate replacement for a stream fishery, insofar as many users are concerned. While stream fishing downstream from the reservoir would be enhanced, it would be practically eliminated in the area to be inundated, together with other stream-related activities and wildlife habitat. Although there would still be opportunity for stream-related activities above Camp Nine, that area is less accessible and would not readily absorb users displaced from the lower reach.

In view of the preponderance of the adverse consequences of maintaining a reservoir of the size proposed by the Bureau, the public interest requires that any permits issued pursuant to Applications 14858 and 19304 prohibit the impoundment of water in New Melones Reservoir for consumptive purposes until further order of the Board following a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the permittee has firm commitments to deliver water for such purposes. [18]

Because of the lack of a showing of need for water from the New Melones Project outside the counties of Calaveras, Tuolumne, Stanislaus and San Joaquin, the permits should restrict the place of use of water for consumptive purposes to those counties, but should provide that a petition to include other specific areas will be considered by the Board upon a showing that water from other CVP sources is not available to serve such areas. The permits should further provide that any use of water for consumptive purposes outside the four basin counties shall be subordinate to beneficial use within said counties and shall terminate when contracts are executed and the water is needed within said counties. Such a provision is necessary to conform to the preference given to use within the Stanislaus River Basin by the authorizing act of Congress (P.L. 87-874), and a similar preference given to the counties of origin and to the watershed of origin and areas immediately adjacent thereto by state law (see Water Code Secs. 10505 and 11460).

Even without storage of water for consumptive use, a substantial part of the 9-mile reach of river channel above Parrotts Ferry Bridge will be inundated at times. A reservoir of 1,100,000 acre-feet, the approximate size estimated to be required to provide for prior rights, flood control, and for water for the previously discussed non-consumptive uses, would inundate all but the upper few miles of this reach. However, 450,000 acre-feet of the 1,100,000 acre-feet is required for flood control. There would be parts of all years, and some entire years, when the flood space would be empty. With the flood space empty, only about 2½ miles of the nine-mile reach would be inundated. Further drawdown into the conservation storage range, which would be the usual summer [19] occurrence, would make even more of the whitewater reach available.

It is apparent that intermittent inundation of the whitewater reach would degrade the appearance of the stream to some extent. However, it should not be necessary to maintain high water levels for long periods. The canyon is steep sided and extensive mud flats should not form. On the whole, degradation of the esthetic values is expected to be minimal.

Releases of Project Water for Preservation and Enhancement of Fishlife

9. Applications 14858 and 19304 list "fish culture" as a purpose. The Bureau proposes to release water from New Melones Reservoir for the preservation and enhancement of fishlife, rather than actually engaging in the raising of fish, and the permits should be issued accordingly.

The value of the Stanislaus River as a salmon fishery resource has been estimated to be $300,000 per year (RT 52).

Revised Department of Fish and Game recommendations now call for releases of 262,000 afa from New Melones Reservoir for preservation and enhancement of the fishery in the Stanislaus River and an additional 50,000 afa for the

same purposes in the Delta in a normal year. The drastic revision upward is due, in part, to a belief on the part of the Department that it is the ability of the spring flows to flush juvenile salmon to the ocean which determines the success of the spawning run two and one-half years later when the same salmon return to the river.

There are a number of factors besides flows which affect the salmon run in the Stanislaus River. Further study of the matter is needed, which should include such factors as the feasibility of providing a fish hatchery instead of large river flows. [20]

Any permits issued pursuant to Applications 14858 and 19304 should contain terms requiring the release of up to 98,000 afa for maintenance of fish and wildlife as planned by the Bureau to be released at a rate and during periods specified by the Department of Fish and Game. Jurisdiction should be reserved by the Board to later revise the releases for preservation and enhancement of fish and wildlife upon reviewing the results of further studies, as mentioned above. Such studies were proposed by the Bureau and agreed to by the Department of Fish and Game. The joint investigation should include an attempt to determine the optimum balance between maximizing fish and wildlife benefits while minimizing reservoir storage levels, during the period prior to storage of water for consumptive uses.

Dry Year Criteria

10. Formal dry year criteria for the benefit of consumptive uses will not be specified at this time since the Board is making no allocation of water for irrigation, domestic, municipal and industrial uses. However, the Board will reserve jurisdiction until the conservation yield is fully allocated to provide such dry year criteria as appear warranted after further hearing.

Hydroelectric Power Development

11. Inasmuch as there is considerable question as to the need for appropriation of water in the proposed quantities for purposes other than the generation of power, it is necessary to determine if the project's power benefit alone justifies storage in addition to that presently needed for other purposes. [21]

Previous mention has been made of the fact that any increase in storage conflicts with use of the upper river for whitewater recreation, stream fishing and wildlife. If as the demand for water for consumptive uses increases and storage for those uses is authorized, storage for power purposes will also be considered. The immediate question, therefore, is whether the need for maintaining the present regimen of the stream outweighs the need for an additional increment of generating capacity during the interim period.

The Bureau calculates the annual benefits of the power function of the proposed project to be over five and one-half million dollars. Restriction of storage for power purposes to the amount required for satisfaction of prior rights and flood control plus the amount allowed for fish and wildlife and water quality control would reduce the capacity of the powerplant from 300 megawatts, with an annual electrical energy production of 430,000 megawatt-hours, to some lesser but undetermined production. The opportunity to contribute to the solution of the present power supply problems should not be overlooked. However, the project was not proposed as a means of alleviating the power shortage and the Bureau did not offer evidence to show that full approval of its power applications would decrease the need for development of other sources of power.

Although maintenance of the upstream reach of the river in its present state solely for recreational uses cannot be

justified strictly on an economic basis. The recreational uses in question have a value beyond that described by dollar resources only. [22]

Opportunities for lake fishing are relatively abundant in California and stream fishing does not appear to be critically lacking. However, the tendency of increased levels of development is to replace stream fisheries with lakes. Therefore, when a choice must be made between two alternates which will result in different types of fisheries, extra weight should be attached to the value of a stream fishery.

The situation with respect to whitewater boating is analogous to that of the fisheries. While the opportunities for flat water boating are abundant, streams suitable for whitewater boating are extremely scarce (RT 1061); also, the Stanislaus may be the second most heavily used river in the nation for that purpose in actual number of visitors per year (RT 1062). In fact, the Bureau has contended that overuse of the river may become a problem.

If the Bureau eventually substantiates the need for storage for consumptive use purposes out-of-basin (such as in the San Luis service area), large quantities of power will be required to deliver the water. At such time, development of the full power potential of New Melones should be considered to offset the increased pumping demand insofar as possible. In the meantime, any power developed at New Melones in excess of the losses in production expected at the existing Melones and Tulloch Powerhouses will be a net gain to the pool of available power. If substantial basin exports are allowed in the future, the balance may shift to a net loss, even with increased production at New Melones. [23]

In view of the foregoing, the Board finds that the reach of river in question is a unique asset to the state and the

nation. Until the need for water for consumptive purposes dictates approval of increased storage, the public interest requires that storage for power purposes also be kept at reduced levels. Permits issued pursuant to Applications 14859 and 19303 for power purposes should be limited to the amount of conservation storage authorized under the permits issued pursuant to Applications 14858 and 19304. Direct diversion under Applications 14859 and 19303 for power purposes should be limited to 6,000 cfs which will be the capacity of the proposed penstocks.

Assignment of State Applications 14858 and 14859 Held by the Board

12. The Board may assign any applications filed in accordance with Water Code Section 10500 and held by the Board when the assignment is for the purpose of development not in conflict with a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the State or with water quality objectives established pursuant to law (Water Code Sec. 10504). Further, no such assignment shall be made that will deprive the county in which the water covered by the application originates of any such water necessary for the development of the county (Water Code Sec. 10505). [24]

The Bureau's project is not in conflict with any such general plan looking toward the development, utilization or conservation of the water resources of the State or with water quality objectives. The California Water Plan provides for the enlargement of existing Melones Reservoir to the capacity of 1,100,000 acre-feet (DWR Bulletin 3, p. 130). The use of a portion of the conservation yield of New Melones Reservoir for water quality control is in keeping

with water quality objectives for the lower San Joaquin River. Assignment of the applications should be subject, in conformity with Section 10505 of the Water Code, to any and all rights of any county in which the water sought to be appropriated originates to the extent that any such water may be necessary for the development of such county. As so conditioned, the assignment will not deprive any such county of any water necessary for its development. Any permits issued pursuant to the applications should contain a similar term.

The counties of origin are further protected by Public Law 87-874. It provides that the needs of the Stanislaus River basin have priority in allocating project water.

The Board's Jurisdiction

13. The regional solicitor, who is the Bureau's legal representative in this proceeding, reiterates the official position that has been advanced by him in previous proceedings before this Board, that we have no jurisdiction to impose any conditions or limitations upon the Bureau's permits. He argues that the Board's function is "ministerial"; that having determined that unappropriated water exists, a permit for the unappropriated water then follows "as a matter of course" (USBR Opening Brief, p. 10). [25]

Such an interpretation of the Board's authority is not supported by either statutory or case law and is not even consistent with other portions of the solicitor's brief or with the Bureau's conduct with respect to previous applications that have been acted upon by the Board and its predecessors. The solicitor himself proposes a special permit term requiring the Bureau to conduct certain studies related to the fishery in the Stanislaus River (USBR Opening Brief, p. 3).

Rather than an extended legal discussion at this time we feel it is sufficient to reaffirm the views expressed in previous decisions concerning the need for the Bureau to comply with state law when it applies to the state for a right to appropriate water of the state. See Decision 990 approving applications of the Bureau for the CVP and Decision 1379 exercising jurisdiction reserved in Decision 990.

Summary

There is unappropriated water available to satisfy the demands of the project as proposed. However, the Bureau has no definite plan as to when or at what specific locations project water will be used for consumptive purposes outside the four basin counties, and it has sufficient surplus water from other sources to meet future increased demands outside these counties for a long period of years. Permits should not be issued for use of water outside these counties at this time.

The public interest requires that the use of the Stanislaus River for whitewater boating, stream fishing and wildlife habitat be protected to the extent that water is not needed for [26] other beneficial uses. Therefore, although there is a demonstrated need for the full yield of the project in the four basin counties at some time in the future, but for which no contracts have been negotiated, and in view of the adverse effect the proposed reservoir will have upon these recreational uses, impoundment of water to satisfy that need should not be permitted at this time. Instead, the Board should retain jurisdiction over the permits for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when the need for the water is substantiated.

Appropriations by storage should be allowed of sufficient water to provide for the preservation and enhancement of fishlife up to 98,000 afa. Storage should also be allowed to meet TDS objectives of 500 ppm and DO objectives as required by the Interim Water Quality Control Plan. The Board should retain jurisdiction for the purpose of conforming the permits to demonstrated needs for water for such purposes. Storage of water should also be allowed to replace water stored in the existing Melones Reservoir which will be inundated. The season of diversion to storage should conform to the availability of unappropriated water; namely, November through June.

Beneficial use of project water can be made for the generation of power. However, preservation of the existing upstream reach of the river for recreation values conflicts with increased storage for power purposes. Therefore, storage for power generation should be approved, but limited to the amount authorized for other project purposes. [27]

By dedicating the initial project yield to demonstrated needs for flows for water quality control and for fish and wildlife preservation and enhancement and allowing use of these flows for power generation, and by deferring significant impairment of upstream recreational values until a need for other uses is demonstrated, the Board's decision assures the maximum public benefit and maximum utilization of the available resources in the public interest.

From the foregoing findings, the Board concludes that Applications 14858 and 14859 should be assigned to the Bureau; that they and Applications 19303 and 19304 should be approved in part and that permits should be issued to the Bureau subject to the limitations and conditions set forth in the order following:

ORDER

IT IS HEREBY ORDERED that Applications 14858 and 14859 be, and they are, assigned to the United States Bureau of Reclamation, subject, in conformity with Section 10505 of the Water Code, to any and all rights of any county in which the water sought to be appropriated originates to the extent that any such water may be necessary for the development of such county.

IT IS FURTHER ORDERED that Applications 14858, 14859, 19303 and 19304 be approved in part, and that permits be issued to the United States Bureau of Reclamation subject to the following conditions and limitations: [28]

1-a. The water appropriated under the permit issued pursuant to Application 14858 shall be limited to the quantity which can be beneficially used and shall not exceed 980,000 acre-feet per annum by storage to be collected from November 1 of each year to June 30 of the succeeding year. Until further order of the State Water Resources Control Board, the water shall be used only for preservation and enhancement of fish and wildlife, recreation and water quality control purposes.

1-b. The water appropriated under the permit issued pursuant to Application 14859 shall be limited to the quantity which can be beneficially used and shall not exceed 6,000 cubic feet per second by direct diversion to be diverted from January 1 to December 31 of each year and 980,000 acre-feet per annum by storage to be collected from November 1 of each year to June 30 of the succeeding year to be used for power purposes.

1-c. The water appropriated under the permit issued pursuant to Application 19303 shall be limited to the quantity which can be beneficially used and shall not exceed 1,420,000 acre-feet per annum to be collected from Novem-

ber 1 of each year to June 30 of the succeeding year to be used for power purposes.

1-d. The water appropriated under the permit issued pursuant to Application 19304 shall be limited to the quantity which can be beneficially used and shall not exceed 1,420,000 acre-feet per annum by storage to be collected from November 1 of each year to June 30 of the succeeding year. Until further order of the State Water Resources Control Board, the water shall be used only for preservation and enhancement of fish and wildlife, recreation and water quality control purposes. [29]

2. Until further order of the Board, permittee shall impound in New Melones Reservoir only such water as is necessary to provide (a) not in excess of 98,000 acre-feet per annum for the preservation and enhancement of fish and wildlife to be released at a rate specified by the California Department of Fish and Game, plus (b) such additional water as is necessary to maintain the water quality conditions set forth in paragraph 5. The above amounts are in addition to water stored for satisfaction of prior rights at existing Melones Reservoir and for flood control. No additional impoundment shall be allowed for power and recreational purposes. Further order of the Board shall be preceded by a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the permittee has firm commitments to deliver water for such other purposes. The Board reserves jurisdiction for the purpose of establishing dry year criteria at the time such impoundment is approved.

3. Before any water is impounded in New Melones Reservoir, permittee shall file with the Board a reservoir

operation study showing the water level elevations required to provide the yield specified in paragraph 2. The study shall include details of the permittee's proposed reservoir clearing plan to show the manner in which clearing will progress as additional storage is authorized. A reservoir operation schedule [30] shall be submitted by the permittee which shall be subject to approval of the Board. The study shall be updated at least once every five years until further order of the Board.

4. Permits issued pursuant to Applications 14858 and 19304 shall authorize the use of water for consumptive purposes only in the counties of Stanislaus, Calaveras, Tuolumne and San Joaquin. A petition to amend the permits to include other specific areas will be considered by the Board upon a showing that water from other CVP sources is not available to serve such areas. Any use of water for consumptive purposes outside the counties of Stanislaus, Calaveras, Tuolumne and San Joaquin that may be authorized later shall be subordinate to beneficial use within said counties and shall terminate when contracts are executed and the water is needed for beneficial use within said counties.

5. Releases of conserved water from New Melones Reservoir for water quality control purposes shall be scheduled so as to maintain a mean monthly total dissolved solids concentration in the San Joaquin River at Vernalis of 500 parts per million or less and a dissolved oxygen concentration in the Stanislaus River as specified in the Water Quality Control Plan (Interim), San Joaquin River Basin 5C, State Water Resources Control Board, June 1971.

In the event that the Water Quality Control Plan (Interim) is amended or superseded, the foregoing water

quality objectives shall be modified to conform to then current criteria. [31]

6. The State Water Resources Control Board reserves jurisdiction over these permits for the purpose of revising water release requirements for water quality objectives and fish releases and for establishing dry year criteria pursuant to studies to be conducted by the permittee and other parties in an effort to better define water needs.

7. Permittee shall file with the Board at least biennially a report of water diversions and use along the Stanislaus River and San Joaquin River between New Melones Dam and the Vernalis gage which will show any increased diversions subsequent to the beginning of releases of water under this permit, which diversions may be encroaching on the water supply provided for preservation and enhancement of fish and wildlife and for water quality control, and will show what steps, if any, permittee is taking to prevent any such encroachment.

8. Permittee shall file with the Board an annual report showing (a) daily storage level in New Melones Reservoir, (b) daily record of total dissolved solids at Vernalis, and (c) daily record of minimum dissolved oxygen level for the day at Ripon or at an alternate location approved by the Board.

9. The maximum quantities stated herein may be reduced in the license if investigation warrants.

10. Construction work shall be completed on or before December 1, 1980.

11. Complete application of water to the uses authorized by the permit shall be made on or before December 1, 1990. [32]

12. Progress reports shall be submitted promptly by permittee when requested by the State Water Resources Control Board until license is issued.

13. All rights and privileges under this permit, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

This continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to minimizing waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (3) suppressing evaporation losses from water surfaces; (4) controling phreatophytic growth; and (5) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation. [33]

14. This permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose.

15. Permittee shall allow representatives of the State Water Resources Control Board and other parties, as may be authorized from time to time by said Board, reasonable

access to project works to determine compliance with the terms of this permit.

16. In compliance with Section 5943 of the Fish and Game Code, permittee shall accord to the public, for the purpose of fishing, reasonable right of access to the waters impounded by the dam under this permit during the open season for the taking of fish subject to the regulations of the Fish and Game Commission.

17. Permittee shall install and maintain an outlet pipe of adequate capacity in his dam as near as practicable to the bottom of the natural stream channel, or provide other means satisfactory to the State Water Resources Control Board, in order that water entering the reservoir which is not authorized for appropriation under this permit may be released.

18. In accordance with the requirements of Water Code Section 1393, permittee shall clear the site of the reservoir of all structures, trees, and other vegetation which would interfere with the use of the reservoir for water storage and recreational purposes. This provision, however, shall not preclude the permittee from retaining vegetation cover in selected areas as required for the protection of wildlife. Clearing operations shall be coordinated with authorized increases in storage levels. [34]

19. Rights under this permit are, and shall be, subject to existing rights determined by the Stanislaus River Adjudication Decree of Superior Court of San Joaquin County dated November 14, 1929, Action No. 16873 with Supplemental Decrees dated February 24, 1930; March 8, 1934; May 8, 1935 and November 29, 1960, insofar as said adjudicated rights are maintained, and such other rights as may presently exist.

20. The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the State Water Resources Control Board if, after notice to the permittee and an opportunity for hearing, the Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the Board finds that (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

21. In order to prevent degradation of the quality of water during and after construction of the project, permittee shall file immediately a report pursuant to Water Code Section 13260 and shall comply with any waste discharge requirements imposed by the California Regional Water Quality Control Board, Central Valley Region, or by the State Water Resources Control Board. [35]

22. Before making any change in the project determined by the State Water Resources Control Board to be substantial, permittee shall submit such change to the Board for its approval in compliance with Water Code Section 10504.5(a).

23. This permit shall be subject to appropriation by storage upstream from New Melones Reservoir for stockwatering and recreational purposes, provided the individual capacities of reservoirs for such purposes do not exceed 10 acre-feet and the reservoirs are kept free of phreatophytes.

24. This permit shall be subject to the following agreements between the permittee and other parties:

(a) The "Agreement and Stipulation" dated October 24, 1972 and executed by the permittee, Oakdale Irrigation District and South San Joaquin Irrigation District.

(b) The agreement between the permittee and Tuolumne County Water District No. 2 dated November 29, 1972.

(c) The agreement dated July 31, 1972 between permittee and Calaveras County Water District.

Reference to the above three agreements shall not be construed as a finding by the State Water Resources Control Board with respect to the rights of any of the parties involved.

25. This permit does not authorize the use of any water outside the counties of origin which is necessary for the development of the counties. [36]

IT IS FURTHER ORDERED that the hearing on this matter will be reconvened not later than July 1, 1986 for the purpose of considering the status of the items of reserved jurisdiction.

Dated: April 4, 1973

/s/ W. W. ADAMS
W. W. Adams, Chairman

/s/ RONALD B. ROBIE
Ronald B. Robie, Vice Chairman

/s/ E. F. DIBBLE
E. F. Dibble, Member

/s/ ROY E. DODSON
Roy E. Dodson, Member

/s/ MRS. CARL H. AUER
Mrs. Carl H. (Jean) Auer,
Member [37]

DEFENDANTS' EXHIBIT 3(a)

State of California
the Resources Agency

State Water Rights Board

APPLICATION TO APPROPRIATE WATER

Proposed Completed Application
Received 6-22-67 by SWRB

Application No. 14858 Filed June 16, 1952 at 11:01 A.M.
The United States of America (See Supplement)

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does hereby make application for a permit to appropriate the following described unappropriated waters of the State of California, SUBJECT TO VESTED RIGHTS:

1. The source of the proposed appropriation is Stanislaus River located in Calaveras & Tuolumne Counties, Tributary to San Joaquin River.

2. The amount of water which applicant desires to appropriate under this application is as follows:

(a) To be directly applied to beneficial use 8,800 cubic feet per second to be diverted from January 1 to December 31 of each year.

(b) To be stored and later applied to beneficial use 980,000 acre-feet per annum, to be collected between October 1 to July 1 of each season.

3. The use to which the water is to be applied is irrigation, domestic, municipal, industrial, fish culture, recreation, and water quality control purposes. [1]

• • •

9.

• • •

(c) The estimated total cost of the diversion works proposed is $133,000,000

• • •

COMPLETION SCHEDULE

10. (a) Construction work will begin on or before 1966
(b) Construction work will be completed on or before 1971
(c) Water will be completely applied to the proposed use on or before 1990

DESCRIPTION OF PROPOSED USE

• • •

San Joaquin Valley and Sacramento-San Joaquin Delta, within 8,000,000 gross acres shown on Drawings No. 214-208-5075, -5076, -5077, and -5078. Releases to the Delta will be redelivered for use in Delta and on Westside of the San Joaquin Valley and the South Coast as shown on the drawings.

Does applicant own the land where use of water will be made? No Jointly?
Contracts will be negotiated with representatives of owners. [2]

• • •

17. Other Uses. The nature of the use proposed is municipal, industrial, fish culture, recreation, and water quality control.
State basis of determination of amount needed Amount needed determined by agencies, departments, and bureaus having special knowledge of the particular requirement. Individual needs and requirements are discussed in House Document No. 453, 87th Congress, 2d Session. [3]

• • •

19. Does the applicant own the land at the proposed point of diversion? No. If not, give name and address of owner and state what steps have been taken to secure right of access Land will be acquired by purchase or condemnation pursuant to law.

20. What is the name of the post office used by those living near the proposed point of diversion? Knights Ferry, California

21. What are the names and addresses of diverters of water from the source of supply below the proposed point of diversion? Oakdale Irrigation District, South San Joaquin Irrigation District, and others.

22. (a) Have you investigated the effect of the proposed appropriation on fish and wildlife? Yes (b) Have you consulted with the State Department of Fish and Game concerning this proposed appropriation? Yes (c) Will your proposed diversion or impoundment of water beneficially or adversely affect fish and wildlife? Enhance fish and wildlife (d) State all data and information reasonably available to you or that can be obtained from the California Department of Fish and Game concerning the extent, if any, to which fish and wildlife would be affected by the appropriation. (Attach further supplement if necessary.) Coordinated planning efforts with U.S. Fish and Wildlife Service have included extensive consultation with the California Department of Fish and Game. Their comments and recommendations are contained in the Department of Water Resources letter dated December 9, 1960, contained in House Document 453, 87th Congress, 2d Session. (e) Describe any measures you propose to take for the protection of fish and wildlife in connection with the appropriation. (Attach further supplement if necessary.) Measures to be taken for the protection of

fish and wildlife are described in House Document 453, 87th Congress, 2d Session, as subsequently modified. (See Supplement) [4]

SUPPLEMENT TO APPLICATION 14858

The United States of America, pursuant to the provisions of the Act of June 17, 1902, (32 Stat. 388) and acts amendatory thereof or supplementary thereto, known as the Federal Reclamation laws, and acting for this purpose by R. J. Pafford, Jr., Regional Director, Bureau of Reclamation, Region 2, P. O. Box 15011, Sacramento 95813, County of Sacramento, State of California, acting for this purpose by delegation of authority from the Secretary of the Interior through the Commissioner of the Bureau of Reclamation, pursuant to the Act of Congress of December 19, 1941, c. 595 (55 Stat. 842).

• • •

PARAGRAPH 2 : Amount of Water

The direct diversion of 8,800 c.f.s. applied for in this application can be a part of the direct diversion applied for in the power generation Application (14859).

Quantities of water temporarily stored and later released to provide flood control space will be in addition to the 2,400,000 acre-feet specified in this application.

PARAGRAPH 4: Points of Diversion and Rediversion

New Malones Dam shall be considered as a point of diversion for all the stored water and part of the direct diversion applied for, although physical works may be located on the bank of the reservoir.

Stored water released from New Melones Reservoir may be rediverted at the Knights Ferry Diversion Dam. Most of the direct diversion applied for will be diverted at

Knights Ferry Diversion Dam, which will be located within the SW¼, NE¼ Section 21, T.1S., R.12E. Diversions and rediversions at Knights Ferry will be conveyed, as required, via the proposed Stanislaus-Montgomery Canal to Montgomery Reservoir for re-regulation and release to the East Side Canal. [1]

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PARAGRAPH 5: Main Conduit

Several distribution systems will ultimately be constructed, each diverting from a different point on the reservoir or rediverting, downstream of New Melones Dam, diversions made from the dam. The Stanislaus-Montgomery Canal, heading at Knights Ferry Diversion Dam below New Melones, will terminate in SW¼ of SW¼ Section 5, T.4S., R.14E., MDB&M.

PARAGRAPH 6(b): Intake or Headworks

The Knights Ferry Diversion Dam, also a point of diversion, will be 160 feet in height, 770 feet long, and will be constructed of concrete.

PARAGRAPH 8: Conduit System

Conduit systems will be installed at such locations, and of such size, as future growth and development within the designated place of use may dictate.

• • •

PARAGRAPH 13: Irrigation Use

The area to be irrigated is presently indeterminate. When operative, the project will supply supplemental water, and the expected flexibility of operation precludes any acreage estimate by crops.

PARAGRAPH 15: Municipal Use

A portion of this water will be supplied, pursuant to Reclamation law, to cities, towns, and other municipalities presently in existence or as may be developed within the place of use. [3]

PARAGRAPH 22(e): Fish and Wildlife

In the conclusions and recommendations that were enclosed with the Assistant Secretary of the Interior's letter dated April 25, 1962, published in House Document No. 453, 87th Congress, 2d Session, the Bureau of Sport Fisheries and Wildlife recommended that approximately 3,400 acres of privately owned riparian land along the Stanislaus River downstream from Knights Ferry Bridge to the San Joaquin River to be acquired in fee, and that approximately 7,230 acres of public domain and private land along the east side of the reservoir be acquired for use as a recreational and wildlife management area. This latter recommendation was changed in their reports. In a letter dated February 28, 1967, they indicated that the area most feasible for establishment of a wildlife unit is an area of 1,790 acres located in the Peoria Mountain area south of New Melones Reservoir site. In addition they recommend that lands acquired for other project purposes be used for wildlife purposes. These lands were recommended for acquisition to mitigate the approximate 10,000 acres of wildlife habitat that would be lost with the construction of the project. The Bureau of Sport Fisheries and Wildlife in their report dated August 14, 1962, recommended that $25,000 be provided to the California Department of Fish and Game for habitat improvement on these lands. The foregoing recommendations were amended by letter from the Regional Director to the District Engineer dated July 30, 1964, to

reflect the following requirements for fish and wildlife mitigation: (a) that downstream riparian habitat lands amounting to 2,130 acres of private land be acquired in fee; (b) that 5,800 acres of land adjacent to the reservoir be acquired, including withdrawal of 2,525 acres of public land; and (c) that project funds amounting to about $120,000 be allocated for wildlife habitat development on the 5,800 acres cited above, and project funds amounting to about $9,000 annually be provided for operation and maintenance of these lands. [4]

State of California—Department of Public Works
Division of Water Resources

STATE ENGINEER

Application No. 14858 Filed June 16, 1952 at 11:01 A.M.

APPLICATION TO APPROPRIATE
UNAPPROPRIATED WATER

I, The Department of Finance of the State of California under and pursuant to the authority vested in it by Part 2, Division 6, of the Water Code of the State of California, does hereby make application for a permit to appropriate the following described unappropriated waters of the State of California, *SUBJECT TO VESTED RIGHTS:*

Source, Amount, Use and Location of Diversion Works

1. The source of the proposed appropriation is Stanislaus River located in Calaveras & Tolumne Counties, tributary to San Joaquin River

2. The amount of water which applicant desires to appropriate under this application is as follows:

(a) For diversion to be directly applied to beneficial use 8800 cubic feet per second, to be diverted from January 1 to December 31 of each year.

(b) For diversion to be stored and later applied to beneficial use 980,000 acre-feet per annum, to be collected between October 1 and July 1 of each season.

3. The use to which the water is to be applied is irrigation, domestic and flood control purposes.

7. Storage Reservoir New Melones Reservoir

• • •

DESCRIPTION OF PROPOSED USE

11. Place of Use. 703,000 acres within Eastern Stanislaus County and Southeastern San Joaquin County

State of California, Department of Finance
[SIGNATURE OF APPLICANT] By James S. Dean
James S. Dean, Director of Finance

This is to certify that the application of which the foregoing is a true and correct copy has been considered and is hereby approved SUBJECT TO VESTED RIGHTS and the following limitations and conditions:

1. The amount of water appropriated shall be limited to the amount which can be beneficially used, and shall not exceed .....

2. The maximum amount herein stated may be reduced in the license if investigation so warrants.

3. Actual construction work shall begin on or before ..... and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted this permit may be revoked.

4. Said construction work shall be completed on or before .....

5. Complete application of the water to the proposed use shall be made on or before .....

6. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Engineer until license is issued.

7. All rights and privileges under this permit including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the Department acting through the State Engineer in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

This permit is issued and permittee takes it subject to the following provisions of the Water Code:

Section 1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code), but no longer.

Section 1391. Every permit shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed.

Section 1392. Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any permittee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for

purposes of sale or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Witness my hand and the seal of the Department of Public Works of the State of California this day of 19

A. D. EDMONSTON,
State Engineer

DEFENDANTS' EXHIBIT 3(b)

State of California
The Resources Agency

State Water Rights Board

APPLICATION TO APPROPRIATE WATER

Proposed Completed Application
Received 6-22-67 by SWRB

Application No. 14859 Filed June 16, 1952 at 11:01 A.M.

The United States of America (See Supplement) does hereby make application for a permit to appropriate the following described unappropriated waters of the State of California, SUBJECT TO VESTED RIGHTS:

1. The source of the proposed appropriation is Stanislaus River located in Calaveras & Tuolumne Counties, Tributary to San Joaquin River.

2. The amount of water which applicant desires to appropriate under this application is as follows:

(a) To be directly applied to beneficial use 8,800 (See Supplement) cubic feet per second to be diverted from January 1 to December 31 of each year.

(b) To be stored and later applied to beneficial use 980,000 acre-feet per annum, to be collected between October 1 to July 1 of each season.

3. The use to which the water is to be applied is power purposes.

4. The point(s) of diversion is (are) to be located as follows: At New Melones Dam. [1]

• • •

9.

• • •

(c) The estimated total cost of the diversion works proposed is $133,000,000.

COMPLETION SCHEDULE

10. (a) Construction work will begin on or before 1966.

(b) Construction work will be completed on or before 1971.

(c) Water will be completely applied to the proposed use on or before 1990.

DESCRIPTION OF PROPOSED USE

• • •

Water will be used in New Melones powerplant for the production of electric energy for domestic and industrial use within the areas served by systems interlocked with Central Valley Project.

Does applicant own the land where use of water will be made? No Jointly?

Contracts will be negotiated with owners or their representatives. [2]

• • •

19. Does the applicant own the land at the proposed point of diversion? No. If not, give name and address of owner and state what steps have been taken to secure right of access. Land will be acquired by purchase or condemnation pursuant to law.

20. What is the name of the post office most used by those living near the proposed point of diversion?

Knights Ferry, California.

21. What are the names and addresses of diverters of water from the source of supply below the proposed point of diversion? Oakdale Irrigation District, South San Joaquin Irrigation District, and others.

22. (a) Have you investigated the effect of the proposed appropriation on fish and wildlife? Yes (b) Have you consulted with the State Department of Fish and Game concerning this proposed appropriation? Yes (c) Will your proposed diversion or impoundment of water beneficially or adversely affect fish and wildlife? Enhance fish and wildlife (d) State all data and information reasonably available to you or that can be obtained from the California Department of Fish and Game concerning the extent, if any, to which fish and wildlife would be affected by the appropriation. (Attach further supplement if necessary.) Coordinated planning efforts with U.S. Fish and Wildlife Service have included extensive consultation with the California Department of Fish and Game. Their comments and recommendations are contained in the Department of Water Resources' letter dated December 9, 1960, contained in House Document 453, 87th Congress, 2d Session. (e) Describe any measures you propose to take for the protection of fish and wildlife in connection with the appropriation. (Attach further supplement if necessary.) Measures to be taken for the protection of fish and wildlife are described in House Document 453, 87th Congress, 2d Session, and as subsequently modified. (See Supplement)

Signature of applicant(s)

/s/ R. J. Pafford, Jr.
Regional Director, Region 2
Bureau of Reclamation [4]

SUPPLEMENT TO APPLICATION 14859

The United States of America, pursuant to the provisions of the Act of June 17, 1902, (32 Stat. 388) and acts amendatory thereof or supplementary thereto, known as the Federal Reclamation laws, and acting for this purpose by R. J. Pafford, Jr., Regional Director, Bureau of Recla-

mation, Region 2, P. O. Box 15011, Sacramento 95813, County of Sacramento, State of California, acting for this purpose by delegation of authority from the Secretary of the Interior through the Commissioner of the Bureau of Reclamation, pursuant to the Act of Congress of December 19, 1941, c. 595 (55 Stat. 842).

PARAGRAPH 2: Amount of Water

A direct diversion of 6,000 c.f.s. will be made through the powerplant located at New Melones Dam.

The 2,400,000 acre-feet will be stored at rates equal to the flow of all presently unappropriated flows above New Melones. Any water temporarily stored and later released to provide flood control space will be in addition to the 2,400,000 acre-feet specified in the application.

PARAGRAPH 22(e): Fish and Wildlife

In the conclusions and recommendations that were enclosed with the Assistant Secretary of the Interior's letter dated April 25, 1962, published in House Document No. 453, 87th Congress, 2d Session, the Bureau of Sport Fisheries and Wildlife recommended that approximately 3,400 acres of privately owned riparian land along the Stanislaus River downstream from Knights Ferry Bridge to the San Joaquin River to be acquired in fee, and that approximately 7,230 acres of public domain and private land along the east side of the reservoir be acquired for use as a recreational and wildlife management area. This latter recommendation was changed in their reports. In a letter dated February 28, 1967, they indicated that the area most feasible for establishment of a wildlife unit is an area of 1,790 acres located in the Peoria Mountain area south of New Melones Reservoir site. In addition they recommend that lands acquired

for other project purposes be used for wildlife purposes. These lands were recommended for acquisition to mitigate the approximate 10,000 acres of wildlife habitat that would be lost with the construction of the project. The Bureau of Sport Fisheries and Wildlife in their report dated August 14, 1962, recommended that $25,000 be provided to the California Department of Fish and Game for habitat improvement on these lands. The foregoing recommendations were amended by letter from the Regional Director to the District Engineer dated July 30, 1964, to reflect the following requirements for fish and wildlife mitigation: (a) that downstream riparian habitat lands amounting to 2,130 acres of private land be acquired in fee; (b) that 5,800 acres of land adjacent to the reservoir be acquired, including withdrawal of 2,525 acres of public land; and (c) that project funds amounting to about $120,000 be allocated for wildlife habitat development on the 5,800 acres cited above, and project funds amounting to about $9,000 annually be provided for operation and maintenance of these lands.

State of California—Department of Public Works
Division of Water Resources
State Engineer

Application No. 14859 Filed June 16, 1952 at 11:01 A.M.

APPLICATION TO APPROPRIATE
UNAPPROPRIATED WATER

I, The Department of Finance of the State of California under and pursuant to the authority vested in it by Part 2, Division 6, of the Water Code of the State of California, does hereby make application for a permit to appropriate the following described unappropriated waters of the State of California, *SUBJECT TO VESTED RIGHTS:*

Source, Amount, Use and Location of Diversion Works

1. The source of the proposed appropriation is Stanislaus River located in Calaveras & Tuolumne Counties, tributary to San Joaquin River.

2. The amount of water which applicant desires to appropriate under this application is as follows:

(a) For diversion to be directly applied to beneficial use 8800 cubic feet per second, to be diverted from January 1 to December 31 of each year.

(b) For diversion to be stored and later applied to beneficial use 980,000 acre-feet per annum, to be collected between October 1 and July 1 of each season.

3. The use to which the water is to be applied is power purposes.

• • •

7. Storage Reservoir New Melones Reservoir.

DESCRIPTION OF PROPOSED USE

11. Place of Use. New Melones Powerhouse within Sections 10 & 11, T 1 N, R 13 E, MDB&M.

State of California, Department of Finance
[Signature of Applicant]

By James S. Dean
James S. Dean,
Director of Finance

This is to certify that the application of which the foregoing is a true and correct copy has been considered and is hereby approved SUBJECT TO VESTED RIGHTS and the following limitations and conditions:

1. The amount of water appropriated shall be limited to the amount which can be beneficially used, and shall not exceed .....

2. The maximum amount herein stated may be reduced in the license if investigation so warrants.

3. Actual construction work shall begin on or before ..... and shall thereafer be prosecuted with reasonable diligence, and if not so commenced and prosecuted this permit may be revoked.

4. Said construction work shall be completed on or before .....

5. Complete application of the water to the proposed use shall be made on or before .....

6. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Engineer until license is issued.

7. All rights and privileges under this permit including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the Department acting through the State Engineer in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

This permit is issued and permittee takes it subject to the following provisions of the Water Code:

Section 1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code), but no longer.

Section 1391. Every permit shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed.

Section 1392. Every permittee, if he accepts a permit, does so under the conditions precedent that no value what-

soever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any permittee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Witness my hand and the seal of the Department of Public Works of the State of California this day of 19

A. D. EDMONSTON,
State Engineer

DEFENDANTS' EXHIBIT 3(c)

State of California—State Water Rights Board
Application No. 19303 Filed March 11, 1960 at 4:58 P.M.

APPLICATION TO APPROPRIATE
UNAPPROPRIATED WATER

5-25-62 Amended Application Received

I, (SEE SUPPLEMENT) of ..... County of ..... State of ....., does hereby make application for a permit to appropriate the following described unappropriated waters of the State of California, *SUBJECT TO VESTED RIGHTS:*

Source, Amount, Use and Location of Diversion Works

1. The source of the proposed appropriation is Stanislaus River located in Calaveras and Tuolumne Counties tributary to San Joaquin River.

2. The amount of water which applicant desires to appropriate under this application is as follows:

(a) For diversion to be directly applied to beneficial use 6,000 (See Supplement) cubic feet per second, to be diverted from January 1 to December 31 of each year.

(b) For diversion to be stored and later applied to beneficial use 2,400,000 acre-feet per annum, to be collected between January 1 and December 31 of each season.

3. The use to which the water is to be applied is power purposes.

• • •

COMPLETION SCHEDULE

10. Construction work will begin on or before 1965. Construction work will be completed on or before 1970. The water will be completely applied to the proposed use on or before 1990.

DESCRIPTION OF PROPOSED USE

11. Place of Use. Water will be used in New Melones powerplant for the production of electrical energy for domestic, commercial and industrial use within the areas served by those systems interlocked with Central Valley Project.

Do(es) applicant(s) own the land whereon use of water will be made? No. Jointly? ..... Contracts will be negotiated with representatives of owners.

• • •

19. Does the applicant own the land at the proposed point of diversion? No. If not, give name and address of owner and state what steps have been taken to secure right of access thereto. Land will be obtained by purchase or condemnation pursuant to law.

20. What is the name of the post office most used by those living near the proposed point of diversion? Knights Ferry, California.

21. What are the names and addresses of claimants of water from the source of supply below the proposed point of diversion? Oakdale Irrigation District, South San Joaquin Irrigation District and others unknown.

SUPPLEMENT TO APPLICATION 19303

The United States of America, pursuant to the provisions of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, known as the Federal Reclamation laws, and acting for this purpose by H. P. Dugan, Regional Director, Bureau of Reclamation, Region 2, P.O. Box 2511, Sacramento 11, County of Sacramento, State of California, acting for this purpose by delegation of authority from the Secretary of the Interior through the Commissioner of the Bureau of Reclamation, pursuant to the Act of Congress of December 19, 1941, c. 595 (55 Stat. 842),

PARAGRAPH 2: AMOUNT OF WATER

A direct diversion of 6,000 c.f.s. will be made through the powerplant located at New Melones Dam.

The 2,400,000 acre-feet will be stored at rates equal to the flow of all presently unappropriated flows above New Malones. Any water temporarily stored and later released to provide flood control space will be in addition to the 2,400,000 acre-feet specified in the application.

This is to certify that the application of which the foregoing is a true and correct copy has been considered and approved by the State Water Rights Board SUBJECT TO VESTED RIGHTS and the following limitations and conditions:

1. The amount of water appropriated shall be limited to the amount which can be beneficially used, and shall not exceed .....

2. The maximum amount herein stated may be reduced in the license if investigation so warrants.

3. Actual construction work shall begin on or before ..... and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted this permit may be revoked.

4. Said construction work shall be completed on or before

5. Complete application of the water to the proposed use shall be made on or before

6. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

7. All rights and privileges under this permit including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unrea-

sonable use, unreasonable method of use or unreasonable method of diversion of said water.

This permit is issued and permittee takes it subject to the following provisions of the Water Code:

Section 1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code), but no longer.

Section 1391. Every permit shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed.

Section 1392. Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any permittee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Dated:

STATE WATER RIGHTS BOARD

DEFENDANTS' EXHIBIT 3(d)

State of California—State Water Rights Board

Application No. 19304 Filed March 11, 1960 at 4:58 P.M.

APPLICATION TO APPROPRIATE UNAPPROPRIATED WATER

Amended Application Received 5-25-62

I, ...(SEE SUPPLEMENT)..... of ..... County of ..... State of ....., does hereby make application for a permit to appropriate the following described unappropriated waters of the State of California, *SUBJECT TO VESTED RIGHTS:*

Source, Amount, Use and Location of Diversion Works

1. The source of the proposed appropriation is Stanislaus River located in Calaveras and Tuolumne Counties, tributary to San Joaquin River.

2. The amount of water which applicant desires to appropriate under this application is as follows:

(a) For diversion to be directly applied to beneficial use 2250 (See Supplement) cubic feet per second, to be diverted from January 1 to December 31 of each year.

(b) For diversion to be stored and later applied to beneficial use 2,400,000 acre-feet per annum, to be collected between January 1 and December 31 of each season.

3. The use to which the water is to be applied is *irrigation, preservation and propagation of fish and wildlife, incidental domestic, recreational and water quality control.*

• • •

Completion Schedule

10. Construction work will begin on or before 1965. Construction work will be completed on or before 1970. The water will be completely applied to the proposed use on or before 1990.

Description of Proposed Use

11. Place of Use. Eastide San Joaquin Valley within the 3,000,000 acre gross *place of use shown on Drawings Nos. 214-208-4036, 4037, 4038 and 4039. Releases to the Delta will be rediverted for use in the Delta and on the Westside of the San Joaquin Valley as shown in these same drawings. Total area, approximately 7,500,000 acres included in the full area shown on maps receiving Stanislaus River water.*

Do(es) applicant(s) own the land whereon use of water will be made? *No.* Jointly?

Contracts will be negotiated with representatives of owners.

• • •

17. Other Uses. The nature of the use proposed is fishery protection and enhancement, and incidental, domestic and recreation. State basis of determination of amount needed. Fishery requirements in accordance with agreements with Fish and Game Commission. Incidental domestic needs will be supplied as development dictates.

• • •

19. Does the applicant own the land at the proposed point of diversion? No. If not, give name and address of owner and state what steps have been taken to secure right of access thereto. Land will be obtained by purchase or condemnation pursuant to law.

20. What is the name of the post office used by those living near the proposed point of diversion? Knights Ferry, California.

21. What are the names and addresses of claimants of water from the source of supply below the proposed point of diversion? Oakdale Irrigation District, South San Joaquin Irrigation District and others unknown.

• • •

SUPPLEMENT TO APPLICATION 19304

The United States of America, pursuant to the provisions of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, known as the Federal Reclamation laws, and acting for this purpose by H. P. Dugan, Regional Director, Bureau of Reclamation, Region 2, P. O. Box 2511, Sacramento 11, County of Sacramento, State of California, acting for this purpose by delegation of authority from the Secretary of the Interior through the Commissioner of the Bureau of Reclamation, pursuant to the Act of Congress of December 19, 1941, c. 595 (55 Stat. 842),

Paragraph 2. Amount of Water

The direct diversion of 2,250 c.f.s. applied for in this application can be a part of the direct diversion applied for in the power generation Application (19303).

Quantities of water temporarily stored and later released to provide flood control space will be in addition to the 2,400,000 acre-feet specified in this application.

Paragraph 3: Use

This water is for use within the area shown on the accompanying Drawing Nos. 214-208, 4036, 4037, 4038 and 4039. Upon completion of the proposed East Side Division, the

operation of New Melones Dam and Reservoir will be integrated with Ceneral Valley Project.

Paragraph 4: Point(s) of Diversion

New Melones Dam shall be considered as a point of diversion for all the stored water and part of the direct diversion applied for, although physical works may, at the discretion of the Bureau, be located on the bank of the reservoir.

Stored water released from New Melones Reservoir may be rediverted at the Knights Ferry Diversion Dam. Most of the direct diversion applied for will be diverted at Knights Ferry Diversion Dam, which will be located within the SW¼, NE¼ Section 21, T. 1 S., R. 12 E. Diversions and rediversions at Knights Ferry will be conveyed, as required, via the proposed Stanislaus-Montgomery Canal to Montgomery Reservoir for re-regulation and release to the East Side Canal. [1]

• • •

PARAGRAPH 13: IRRIGATION USE

The area to be irrigated is presently indeterminate. When operative, the project will supply supplemental water, and the expected flexibility of operation precludes an acreage estimate by crops. [2]

• • •

This is to certify that the application of which the foregoing is a true and correct copy has been cons 000 feet; materials by the State Water Rights Board SUBJECT TO VESTED RIGHTS and the following limitations and conditions.

1. The amount of water appropriated shall be limited to the amount which can be beneficially used, and shall not exceed .....

2. The maximum amount herein stated may be reduced in the license if investigation so warrants.

3. Actual construction work shall begin on or before ..... and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted this permit may be revoked.

4. Said construction work shall be completed on or before .....

5. Complete application of the water to the proposed use shall be made on or before .....

6. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

7. All rights and privileges under this permit including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

This permit is issued and permittee takes it subject to the following provisions of the Water Code:

Section 1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this diversion (of the Water Code), but no longer.

Section 1391. Every permit shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed.

Section 1392. Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any permittee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Dated: STATE WATER RIGHTS BOARD

DEFENDANTS' EXHIBIT 4

UNITED STATES
DEPARTMENT OF THE INTERIOR

Bureau of Reclamation
Regional Office, Region 2
P. O. Box 15011
Sacramento, California 95813

JUN 21, 1967

California State Water Rights Board
1416 Ninth Street, Room 1140
Sacramento, California 95814

Gentlemen:

Subject: Applications 14858 and 14859 to appropriate water from the Stanislaus River

This is our petition for assignment of State Applications 14858 and 14859, which were filed in accordance with Part 2 of Division 6 of the California Water Code. The request for assignment of these applications is made for the use of Stanislaus River water in connection with the New Melones Unit of the Central Valley Project.

New Melones Reservoir was authorized by the Flood Control Act of 1944 (Public Law 534, December 22, 1944, 78th Congress, 2d Session), as modified by the Flood Control Act of 1962 (Public Law 874, October 23, 1962, 87th Congress, 2d Session). The authorization plan provides for, among other things, the construction of a dam on Stanislaus River about 35 miles northeast of Modesto, California, to create a reservoir with a gross storage capacity of about 2,400,000 acre-feet for flood control, irrigation, pow-

er, recreation, water quality, and fish and wildlife purposes. The plan also includes construction of a 150,000 KW capacity hydroelectric powerplant immediately below the dam. This unit of the Central Valley Project will furnish flood protection to about 35,000 acres of highly developed agricultural land in the flood plain of Stanislaus River and to suburban areas of Ripon, Oakdale, and Riverbank. It will make available a new irrigation supply for diversion to the local service areas and for export to the southern San Joaquin Valley, and will provide power and recreational opportunities for public use.

New Melones Dam and powerplant will be constructed by the Corps of Engineers and, upon completion, will become an integral part of the Central Valley Project and be operated and maintained by the Secretary of the Interior pursuant to the Federal Reclamation Laws.

Since the New Melones Unit is to become an integral part of the Central Valley Project, its construction will be in accordance with a general or coordinated plan for the development of water of the State of California and will meet all the requirements outlined under Section 10504.S, Part 2, Division 6, of the Water Code. The assignments would not, in our opinion, deprive the counties in which the water covered by the applications originates of any such water necessary for the development of the county. In order to assure such a reservation of water, the following provision has been included in the authorizing Act:

> "That before initiating any diversions of water from the Stanislaus River Basin in connection with the Central Valley Project, the Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin and the diversions shall at all times be subordinate to the quantities so determined."

Applications 14858 and 14859 have not been completed in accordance with the regulations of your Board; therefore, there are enclosed, as required by Section 10504.01 of the Water Code, copies of proposed completed applications consistent with our requested assignments.

If there is any additional information you would need in connection with this petition, please let us know.

Sincerely yours,

C. H. Kadie
Acting Regional Director

Enclosures

DEFENDANTS' EXHIBIT 8

DEPARTMENT OF THE ARMY

Office of the Under Secretary
Washington, D.C. 20310
18 May, 1973

Honorable Russell E. Train
Chairman
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20006

Dear Mr. Train (Russ):

I apologize for the delay in replying further, however I wanted to be sure we had carefully considered all aspects presented in your letter regarding the New Melones Project. The letter called attention to Decision 1422 of the California Water Resources Control Board, suggested that a supplemental environmental impact statement be prepared discussing the implications of that decision prior to any further action on the project, and further suggested that it might be appropriate to request postponement of the litigation now before the United States Court of Appeals for the Ninth Circuit on the issue of NEPA compliance. Based upon legal and technical advice on this matter, I am of the opinion that a supplemental impact statement is not required at this time, nor do I feel that postponement of the pending litigation is appropriate.

I am advised that the position of the United States, expressed by the Justice Department in its brief in the Court of Appeals, is that the environmental impact statement prepared for the New Melones Project is legally sufficient

without an explicit discussion of Decision 1422. That argument is based upon the legal premise that neither the construction nor operation of this Congressionally authorized project is subject to conditions imposed by State law, which are inconsistent with the clear directives of Congress.

I appreciate the concerns reflected in your letter that construction will proceed simply on the assumption that the conditions imposed by Decision 1422 will ultimately be held not to restrict the operation of the New Melones Reservoir. I cannot agree that construction of this project should be delayed, at great cost to the United States, pending resolution of a legal issue which is likely to take many years. This is not solely based on the conclusion that California lacks authority to prevent a project from being operated in accordance with Congressional mandate, but is also based on the view that Decision 1422, if held applicable, "might well impair full effectuation of the project purposes" is not grave enough to warrant further delay in the construction of this project. [1]

It is my understanding that the State Board's opinion does not purport to restrict the impoundment of water in the future on the basis of the situation presently existing. The decision merely preserves the board's jurisdiction to decide whether to permit the impoundment for specific purposes at the time such impoundment is scheduled. For example, the decision does not bar the impoundment of water for consumptive use; it merely requires that before any water is impounded, the Bureau show that the benefits of any specific use will outweigh the damage to fish, wildlife and recreation, and that it has a firm commitment to deliver the water. Likewise, I am advised that the decision does not bar the use of water from New Melones outside the four-county area, but merely requires as a condition precedent to

such use that the Bureau find that the need for such water could not be satisfied from another source. Since the dam will not be operational until 1980, it would be unwise to assess the economic feasibility of constructing the project on the assumption that the board will not exercise the authority it retains to permit needed impoundment at that time. The Corps, in calculating the expected benefits of the project, necessarily evaluated the long-term needs of the region. The board, in its decision, has manifested its awareness of the dynamic nature of these needs. On p. 27 of its opinion for instance, the board states that, while impoundment "should not be permitted *at this time,*" "there is a demonstrated need for the full yield of the project . . . at some time in the future" (emphasis added). At most, therefore, the result of this decision, even if upheld in court, would be to defer slightly the beneficial use of the full conservation yield of the project. Most of the project purposes are permitted by the decision. The decision does not render the project useless, nor does it fundamentally alter the value of the project.

Finally, I would like to respond more specifically to the suggestion that another supplemental impact statement prior to further construction would be an appropriate vehicle for discussing the effect of the State Board's decision on the operation of the project. My information indicates that the United States District Court held that the present statement fully complies with the requirements of the National Environmental Policy Act of 1969. Further, I am advised that the United States continues to advance that view, now before the Ninth Circuit Court of Appeals. Thus another impact statement now seems unneeded. As mentioned above, operation substantially congruent to that conditioned by Decision 1422 is discussed in the present impact

statement. Finally, the District Court has retained jurisdiction ". . . to insure that data dealing with the operation of the dam is forthcoming in a future or supplemental EIS, well before the New Melones Dam actually becomes operational." Such a statement would surely discuss the board's decision. To write an impact statement discussing that decision prior to construction of the main dam, on the other hand, would cause further delay, thereby substantially increasing construction costs (the parties stipulated in District Court that a six-month delay would increase construction costs by 12.6 million) and delay needed flood protection. The board's decision may ultimately be held to be without force insofar as it purports to regulate the operation of the dam, since by its own terms the decision merely retains the board's jurisdiction to regulate the operation of the dam after it is completed [2] and does not immutably restrict that operation. Based on the foregoing it does not seem appropriate that construction be delayed.

With highest regards, as always, I remain

Most sincerely,

/s/ Kenneth E. BeLieu
Under Secretary of the Army [3]

DEFENDANTS' EXHIBIT 11-3

Before the

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

In the Matter of Applications
14858, 14859, 19303 & 19304
to Appropriate from the
Stanislaus River

OPENING BRIEF OF THE UNITED STATES

United States Department of the Interior
Office of the Regional Solicitor
Sacramento Region
1800 Cottage Way
Sacramento, California 95825

January 31, 1973

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I.

INTRODUCTION

Before discussing what we deem to be the issues before the State Water Resources Control Board we shall mention the principal items which, though they consumed much time in the hearing, are not issues. These are Friant Dam and Reservoir and the feasibility of the New Melones Project. These matters have no relation to the issues before the Board, which are: whether there is unappropriated water to satisfy Applications 14858, 14859, 19303 and 19304, and whether State Applications 14858 and 14859 should be assigned to the United States. Subsidiary to these questions are those other matters listed in the staff summary:

> 2. Anticipated injury, if any, to the protestants and other lawful downstream users should the applications be approved with specific data substantiating such an injury.
>
> 3. What special terms and conditions, if any, should be included in the permits issued pursuant to the subject applications if approved.
>
> 4. Intent and ability of applicant to proceed with due diligence to construct the necessary works and to place water to beneficial use should the applications be approved.
>
> 5. Whether the project to be constructed under Applications 14858 and 14859 is for a purpose of development not in conflict with the general or coordinated plan for development of the waters of the State.
>
> 6. Whether the requested assignment of Applications 14858 and 14859 will deprive the counties of origin of any waters which may be required for their development.

> 7. Compatibility of the project with the Water Quality Control Plan (Interim), San Joaquin, Basin 5C.
>
> 8. Intent and ability of applicant to operate its project, if approved, so as not to further degrade the quality of water in that portion of the San Joaquin River affected downstream to Middle River.

We will first examine what has been established on these points, next consider the evidence of the protestants and finally comment on the legal issues involved.

II.

BUREAU'S EVIDENCE ON THE ISSUES

1

Existence of Unappropriated Water to Satisfy the Applications. The testimony of Gleason L. Renoud (R.T. pp. 37 through 59, 63 through 72) and Bureau Exhibits 10 through 27, 28A and 29 through 35 established the existence of unappropriated water. No contrary evidence was introduced.

2

Anticipated Injury to Protestants and Other Lawful Downstream Users. Agreement was reached with the principal users, Oakdale, and South San Joaquin Irrigation Districts. The agreement is in evidence as Bureau Exhibit 37. [2]

The Bureau will operate the project so as not to interfere with downstream rights and stands ready to enter into agreements with these users.

3

Special Terms and Conditions. So that the amount of water required for salmon can be determined the Bureau proposes the following condition:

In order to provide water for the Stanislaus River fishery and the other beneficial uses under Applications 14858 and 19304 and to determine the optimum releases from New Melones Reservoir needed for the protection and enhancement of the fishery resources the Bureau of Reclamation in cooperation with the Bureau of Sport Fisheries and Wildlife and the Department of Fish and Game shall conduct experimental studies relating to the anadromous fishery in the Stanislaus River and adjacent streams. Annual reports on the progress of these studies will be submitted and a proposed plan for the releases of water from New Melones Reservoir for the protection and enhancement of the Stanislaus River fishery shall be submitted to the Board not later than January 1, 1988.

4

Intent and Ability of Applicant to Proceed with Diligence to Construct the Necessary Works and Place the Water to Beneficial Use. [3] The Board is aware that only the existence of litigation prevents the immediate award of the contract for construction of the dam. The evidence of need in the local area was uncontradicted. During buildup of use in this area, beneficial use of this water will be made for fish and wildlife through co-operative studies with the Department of Fish and Game, by production of electrical energy and by uses out of the delta.

5

Whether the Project to be Constructed under Applications 14858 and 14859 is not in Conflict with the General and Co-ordinated Plan. The State of California has declared that the New Melones Project is in conformance with the California Water Plan. (Bureau Exhibit 2, p. xvi)

6

Whether the Requested Assignment of Applications 14858 and 14859 would Deprive the Counties of Origin of any Waters. The support of the Bureau by counties of origin at the hearing shows that they are convinced that the project will benefit them. The authorizing act provides that the Stanislaus River Basin gets first call on the water developed by New Melones to satisfy existing and anticipated future needs. (Bureau Exhibit 1, p. 1191)

7

Compatibility of the Project with the Water Quality Control Plan (Interim) San Joaquin Basin 5C. Bureau Witness John Rowell pointed out that Staff Exhibits 11, 12, and 13 [4] show that the New Melones Project is compatible with the Water Quality Control Plan (Interim) San Joaquin Basin 5C.

8

Intent and Ability of the Bureau to Operate the Project so as to not Further Degrade the Quality of Water in the San Joaquin River. The testimony of Bureau Witness John Rowell (R.T. p. 211-215), Staff Exhibits 11, 12, and 13 and Bureau Exhibit 36 demonstrate not only the intent and ability of the Bureau to operate the project so as to not further degrade the quality of water in the San Joaquin River, but further the intent and ability to improve it.

III

EVIDENCE OF THE DEPARTMENT OF FISH AND GAME

We cannot refrain from mentioning that the present position of the Department of Fish and Game differs from that transmitted to the Corps of Engineers (Bureau Exhibit 2 pp. 95-98) and which was before Congress when it authorized New Melones Dam and appropriated money for it.

The Department's present position would require practically the entire yield of New Melones for salmon.

Our first comment on the evidence presented by the Department is that Figure 1 which follows page 2-13 in Department Exhibit 2 and which shows a relationship between spring outflows in the Stanislaus and the number of female spawners 2½ years later, because it uses a logarithmic scale against an arithmetic scale, makes it difficult to see what [5] is happening. Plotting on two arithmetic scales would show rapidly decreasing returns for additional increments of outflow. Secondly, drawing a line between points does not establish a relationship where there is no "fit". In Figure 1 the points fluctuate greatly from the line.

Next, Table 1 on page 2-5 of Department Exhibit No. 2 uses the years 1947 through 1971 (except for 1950, when no count was made) to tabulate the spawning runs on the Stanislaus. Using these years, the Department arrives at an average present run of 8,600 fish. However, the Tri-Dam Project was completed in 1958. For the years since completion of the project we find a present average run of 5,900 fish. It is a fair question to ask if there is a relationship between the completion of Tri-Dam and the lower average run since that time. The answer is yes and the

relationship is shown by Bureau Exhibit 53 and the testimony of Dale Creasy (R.T. pp. 1339-1341). That the relationship exists is not surprising. Oakdale and South San Joaquin Districts will start the irrigation season with as much storage as possible. If the reservoirs are low the spring flows are stored. Moreover the magnitude of the flows at Ripon tells only part of the story. Comparison of Bureau Exhibits 12 and 14 show that when spring flows are low at Ripon they are almost non-existent above Orange Blossom Bridge, where, according to the testimony of the Department, most of the spawning occurs.

IV

EVIDENCE OF ENVIRONMENTAL DEFENSE FUND

Dr. Richard Norgaard's testimony was that the development of any [6] irrigation water at New Melones is bad for California agriculture. The farmer does not share Dr. Norgaard's philosophy. The farmer knows that each year he must pump water from a greater depth than the year before. We shall pass over the obvious difficulty of even short-term predictions of agricultural supply and demand. Dr. Norgaard's testimony indicates that he is under the impression that when a dam is closed all of the water is immediately applied to land. Apparently he is unaware of the necessity of building distribution systems and of the gradual build-up of use of a new supply of water. He speaks of three to five years and then adopts the year 1990 as the time of full development. To balance demand with the agricultural supply attributable to New Melones one must peer further into the future, a distince at which Dr. Norgaard admits even his vision fails. (R.T. p. 1098)

In any event, it is not the function of the Board to determine that agriculture shall cease or to end an existing economy.

Dr. Leo Eisel attempted to demonstrate by his testimony and in EDF Exhibit 10 that a 2,400,000 acre-foot capacity reservoir would furnish little more of the Department of Fish and Games requested releases than would a 560,000 acre-foot reservoir. There are two major errors in the demonstration.

First—Dr. Eisel used for stream flow data Bureau Exhibit 28A. This exhibit is intended to show the amount of unappropriated water available [7] after all prior rights, whether developed or not, are satisfied. The ultimate development of these prior rights will occur far in the future and it is certain that some of them never will be developed. Much of the water that would satisfy these rights is available for the New Melones Project during the useful life of the project.

Secondly—Dr. Eisel did not utilize the advantage provided by the enlarged reservoir to provide the optimum firm yield. On streams such as the Stanislaus with flows fluctuating greatly from year to year, a large reservoir with carry-over storage is necessary. To determine the yield during a dry cycle the reservoir must be considered full going into that cycle. The streamflows shown on USBR Exhibit 27 show that a 2,400,000 acre-foot reservoir would have a full conservation pool at the beginning of Dr. Eisel's operation study, 1922.

To make a meaningful examination of the yield of the different sized reservoirs a study should have commenced with a full conservation pool for each of the reservoirs.

Although no evidence was submitted on the point, EDF attempted to minimize the power production of New

Melones by showing that it is only a small percentage of the power produced in California. With the foreboding energy crisis in the nation and in California no increment of power production should be discounted, particularly power produced so cleanly. Moreover, New Melones power is peaking power. The water rests in New Melones Reservoir ready to release its potential energy upon call. This peaking [8] power supports a much larger quantity of energy by supplying the increments required for the total useable quantity.

V

JURISDICTION OF THE BOARD

There can be no argument with two propositions: First, under Article IV of the United States Constitution, the Supremacy Clause, conflicting state law must yield to federal law. Secondly, any authority the Board possesses over the Bureau of Reclamation must originate in Section 8 of the Reclamation Act of 1902.

> "Sec. 8. [Irrigation laws of States and Territories not affected—Interstate streams—Water rights.]—Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this act

shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right. (32 Stat. 390; 43 U.S.C. §§ 372,383)"

The operation of Section 8 has been determined by the Supreme Court:

"As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of a federal project. As the Court said in *Nebraska v. Wyoming, supra,* at 615: 'We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system.'" (Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 291 (1958)) [9]

Whether the Board has authority under Section 8 to alter a federal project from what Congress authorized has been decided:

"We must agree with the government that 'reason precludes an interpretation of the general provisions of Section 8 of the Reclamation Act [of 1902] and Sections 1 and 8 of the Flood Control Act [of 1947] which would impute to Congress an intention to frustrate its plans for this project by subjecting it to the risk that it might never be used for some of the authorized purposes, should a state permit not be forthcoming.'" (Turner v. Kings River Conservation District, 360 Fed. 2d 184, 198 (1966))

Under the law as declared by the courts the Board's function becomes ministerial. It must determine whether unappropriated water exists. A permit for the unappropriated water then follows as a matter of course.

Nor does state law give the Board any wider authority. The procedure for authorization of a federal project includes a report to Congress with comments on the report by the appropriate state agency. (In the case of New Melones this is Bureau Exhibit 2) Congress has before it the official position of the state when it considers the project. It may, if it wishes, modify the project on the basis of the state's comments, but nowhere is there any provision for the state to overrule Congress or to substitute its wisdom for that of Congress. Even this limited role of the State does not belong to the Board. Sections 450 through 453 of the Water Code puts in statutory form what was the practice before the enactment of these sections: the Governor or such state official or agency as he may designate provides the comments. The Board has never been designated by the Governor to perform this function. [10]

The evidence introduced by Environmental Defense Fund went to three points: the inundation of the whitewater area, the advisability of irrigating land and the advisability of building a reservoir of 2,400,000 acre-foot capacity. None of these matters fall within the jurisdiction of the board. No argument should be required on these points, however, we will remark that inundation of the whitewater area insofar as it affects the navigability of the Stanislaus River (or of the San Joaquin) is completely within the discretion of Congress. The authorizing act states:

"Sec. 203. The following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized .... The New Melones Project, Stanislaus River, California, authorized by the Flood Control Act approved December 22, 1944 (58 Stat. 887) is hereby modified substantially in accordance with the recommendations of the Chief of Engineers in House

Document Numbered 453, Eight-Seventh Congress . . ."
(Bureau Exhibit 1, pp. 1180 and 1191)

Moreover there is no interference with water rights or any rights cognizable by the Board upstream from New Melones Dam.

VI

CONCLUSION

It is submitted that on the actual issues before the Board the evidence of the Bureau was convincing and uncontroverted, that the evidence of the Protestants was for the most part speculation based on faulty assumptions and that Applications 14858 and 14859 should be assigned to the [11] Bureau and Permits should be issued on these two applications and on Applications 19303 and 19304.

Respectfully submitted, this 31st day of January, 1973.

CHARLES R. RENDA
Regional Solicitor
Sacramento Region
U. S. Department of the Interior

By JOHN L. RICE
John L. Rice
Attorney [12]

DEFENDANTS' EXHIBIT 11-11

Before the
STATE WATER RESOURCES CONTROL BOARD
STATE OF CALIFORNIA

In the Matter of Applications
14858, 14859, 19303 & 19304
to Appropriate from the
Stanislaus River

REPLY BRIEF OF THE UNITED STATES

United States Department of the Interior
Office of the Regional Solicitor
Sacramento Region
2800 Cottage Way
Sacramento, California 95825

February 15, 1973

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	Table 1 (following page 10)	

I INTRODUCTION

The Protestants and Interested Parties filing opening briefs can be placed into two groups. The first group is composed of those who do not oppose the construction of the New Melones Project and includes:

McMullin Reclamation District No. 2075 and the others filing a joint brief with the District.

Stanislaus River Flood Control Association and Stockton-East Water District (who filed a joint brief).

San Joaquin County Flood Control and Water Conservation District.

Banta Carbona Irrigation District.

Delta Water Association and Delta Water Users Association (who filed a joint brief).

Department of Fish and Game.

We shall consider together the briefs of all of these protestants except for the Department of Fish and Game, which we will discuss separately.

A second group is opposed to the construction of the New Melones Project and includes:

Contra Costa County Water Agency, *et al.*
Sierra Club.
Environmental Defense Fund.

We fail to discern anything in the brief of the Contra Costa County Water Agency that touches upon the issues before the Board and we will [1] not respond to it. We will separately discuss the briefs of the Sierra Club and the Environmental Defense Fund.

II THOSE NOT OPPOSED TO THE NEW MELONES PROJECT

A. *Point of Rediversion*

Several of this group object to the Knights Ferry point of rediversion. Unless the East Side Canal is constructed there will, or course, be no rediversion at Knights Ferry. If East Side becomes a reality, this point of rediversion would add flexibility to the operation of New Melones and East Side through the option of supplying part of the New Melones service area or the East Side service area from either source. The result would be a more efficient operation and a saving of water.

B. *Use Limited to the Counties of Calaveras, Tuolumne, Stanislaus and San Joaquin.*

Several of this group would restrict the use to the four counties. Applications 14858 and 14859 are state filings and subject to the county of origin provision. The four counties can be protected in the assignments. The authorizing act (USBR Exhibit 1) contains a similar provision for the Stanislaus River Basin. The Secretary of the Interior, well before the dam is completed, will determine the quantity of water necessary to supply the future needs of the basin. Much study, of course, must be made in cooperation with the counties, aimed at refining their estimates of need, at determining what physically can be done and [2] determining which areas can be better supplied from another source. During the build-up of the four counties uses the Bureau should be free to put the water to beneficial use elsewhere.

C. *Water Quality Standards.*

Many of this group urge that the Board impose the water quality standards asked by the Delta Water Agency. The water quality to be maintained in the Southern Delta under

the Bureau's Memorandum of Agreement with the State Regional Water Quality Control Board (Staff Exhibit 13) is that adopted by the State Board in its Resolution 68-17. This quality is better than that which now exists (USBR Exhibit 43). Congress gave to the Secretary of the Army the option of including storage space for water quality control and did not give to the Board the authority to override the Secretary's decision.

III DEPARTMENT OF FISH AND GAME

The question before the Board is whether there is unappropriated water to satisfy the New Melones applications. The only argument that the Department might properly make is that some of the flows in the Stanislaus should occur as they now do to preserve the present fishery. However, Fish and Game is asking for enhancement. After discussing present fishery problems the Department on page 5 of its brief states:

> "The water of San Joaquin drainage origin should be provided by the New Melones Project to correct these problems." [3]

This would all be very well if Congress had authorized the project to correct all present fishery problems or had given the Department or the Board the power to so modify the project. However, Congress did not do so.

That the flows requested by the Department are greatly in excess of those that occur now during what the Department says are the critical months and provide a great enhancement of the fishery is obvious from Table 1. This table is compiled from Staff Exhibits 3 and 4. During the five years examined, from 181,000 to 272,000 acre feet annually must be released from New Melones to increase the historical flows to those requested by the Department.

It need not be pointed out that, although the United States plans such acquisition, the Board cannot order the United States to acquire gravels of wildlife habitat.

We iterate that the Bureau is willing to work with the Department, within the total requirements of the project, to achieve the Department's goals.

IV ENVIRONMENTAL DEFENSE FUND

The Environmental Defense Fund makes several statements which we believe are not supported by the record. The propositions urged by EDF are:

A. *The Bureau has no present plan for application of the water to a beneficial use within a reasonable time.* [4]

The Bureau has many plans and testified to them. It has no final plan and will not have until the supply for the local area is determined and it is determined what area has the most urgent need for the remaining or interim yield. It must be remembered that the dam will not be completed until five years after construction of the dam begins.

Speaking of the San Felipe Division, EDF states that wastewater recycling and groundwater recharge appear to be a feasible alternative to importation of CVP water. Groundwater recharge is part of the Bureau's plans for San Felipe. As for wastewater recycling, since the transcript citation given by EDF does not touch upon the subject we cannot determine upon what evidence EDF relies. Certainly there is no evidence in the record of any determination that wastewater recycling is economically feasible or that public health requirements would not place impossible conditions upon recycling.

Speaking of the Delta-Mendota service area, EDF says it is not known whether the application of the 160 acre

limitation would be acceptable. The limitation has always been acceptable in an area needing water.

As for the West Plains section of Westlands Water District, water is required from somewhere. It is true that New Melones water will be mixed with other water in the Delta before going to Westlands but it is still a place of use for New Melones water. The point is that before long total supply will not meet the demand. [5]

As suggested by EDF there is no present final plan for a cross valley connector. Not everything can be done simultaneously and the cross valley connector would be of little use without a water supply.

B. *The Bureau is at the present time and will be for the foreseeable future up to its ears in uncommitted, uncontracted water.*

Alas, this is not true. Revised USBR Exhibit 46 shows that of the CVP yield of 9,250,000 acre-feet over 70 percent is now under contract. USBR Exhibit 39 shows that the entire CVP yield is committed. The requirements of Decision 1379 would reduce the CVP yield by 2.2 million acre-feet annually (USBR Exhibit 48); without New Melones, the commitments would only be met until 1978 (USBR Exhibit 46). If the Environmental Protection Agency adopts the requirements of Decision 1379 we may be in a water crisis. We say "may" because it must then be determined whether Congress intended to override the provisions of the acts under which the CVP was built. It would be comforting, of course, to have Congress make the determination by subsequent legislation.

C. *There has been no showing that the water will be put to beneficial uses.*

The water will be put to use in one of the areas under study. Which area will depend upon the urgency at the

time the supply is developed, whether it is an interim supply and other considerations. Whichever area it will be, the use satisfies the definition of beneficial use contained in the Water Code.

D. *The water will not be put to beneficial use within a reasonable period of time.* [6]

It is impossible not to put the water to beneficial use. If it is not used in the local area the winter and spring flows will be released into the Delta at times when it will be made use of.

E. *The Bureau has not shown that it will put the water to a use not in conflict with a general or co-ordinated plan.*

The State of California in its comments on the New Melones Report (USBR Exhibit 2) thinks otherwise.

F. *The usefulness of the water quality releases is not known.*

The quotation of the Bureau witness John Rowell relied upon by EDF to make this point is taken out of context. The witness has just finished discussing the effect of the water quality and fishery releases and was discussing what further effect the conservation yield would have. This further effect, of course, cannot be predicted until its place of use, quantities and timing are determined.

EDF fears that leaching of salts will degrade the San Joaquin River. The problem is independent of New Melones

and will be exacerbated by leaching with groundwater of lower quality than that of the Stanislaus River.

G. *The testimony of EDF witnesses is unrebutted.*

EDF refers to the unrebutted testimony of Dr. Norgaard and Dr. Eisel. Dr. Norgaard himself limited his testimony to events up to the year 1990. Nor does one need to be a hydrologist or computer scientist to realize that if one starts both resorvoirs with a small pool and runs a study through a period when a small resorvoir can control the inflow, a small [7] reservoir performs as well as a large one. This is reason for a large reservoir—to conserve the water of the wet year.

V SIERRA CLUB

Sierra Club urges several propositions:

A. *Water should not be delivered to areas experiencing subsidence because of groundwater pumping.*

How this would ameliorate the problem we do not see. Substituting a surface supply for the pumped supply would permit natural recharge and prevent the additional loss of underground storage space.

B. *Wastewater reclamation can supply the needs of the service area of the San Felipe Division at a lesser cost to the nation and to the Water District.*

The study mentioned, of course, is not in evidence. Our understanding of the study is that it concludes only that wastewater reclamation merits further study.

C. *The fact that the Bureau has proposed the Suisun Marsh area as one for use of New Melones water leads Sierra Club to question whether the Bureau has a real interest in reasonable water resources management and water conservation.*

We cannot find such a proposal in the transcript. However, it is a good idea and by an exchange of water can be accomplished.

VI SOME GENERAL REMARKS

We trust we will be indulged in a few general remarks though they stray from the issues before the Board.

Some parties imply that Bureau officials are advancing a questionable project against the interests of the State of California. It is, [8] of course, impossible for a project to be authorized by Congress unless responsible agencies of the state advocate it. Even then authorization only results from the strenuous efforts of California's representatives in Congress. The thing is that these parties arrogate to themselves the decision of what is in the interests and what is against the interests of the people of California.

California is the leading agricultural state in the nation. It did not reach this position by refusing to modify the regimen of nature. Anyone who travels the Central Valley cannot avoid seeing the benefits of the Central Valley Project. We do not think that this is bad. However, though all looks prosperous, in some instances we are living on our capital. We are mining our groundwater. Unless we introduce a surface supply so that groundwater use and recharge are in balance these areas will go out of production and the economic repercussions will extend beyond

the area itself. Most of the proposed uses of New Melones will replace or supplement groundwater pumping.

Several parties make oblique references to Friant Dam in a way that implies that Friant is an evil thing. Those who use water from Friant would not agree, but in any event the quarrel is not with the Bureau but with the legislature, for Friant is operated just as Section 11226 of the Water Code says it should be. [9]

Respectfully submitted, this 15th day of February, 1973.

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By JOHN L. RICE

John L. Rice
Attorney [10]

TABLE 1

NEW MELONES STORAGE RELEASES REQUIRED TO MEET DEPARTMENT OF FISH AND GAME'S REQUESTED MINIMUM FLOWS IN STANISLAUS RIVER BELOW GOODWIN DAM

			Flows—Stanislaus River Below Goodwin Dam (all quantities in acre-feet)									
	Fish & Game's requested minimum flows below Goodwin Dam		Water Year 1959-60		Water Year 1960-61		Water Year 1963-64		Water Year 1965-66		Water Year 1967-68	
Month	c.f.s.	Ac. Ft.	Historical flow	Storage releases required	Historical flow	Storage releases required	Historical flow	Storage releases required	Historical flow	Storage releases required	Historical flow	Storage releases required
Oct.	200	12,298	684	11,614	1,410	10,888	12,900	0	10,840	1,458	6,670	5,628
Nov.	200	11,901	1,520	10,381	3,410	8,491	8,690	3,211	40,530	0	32,480	0
Dec.	200	12,298	1,890	10,408	4,470	7,828	26,870	0	80,610	0	47,360	0
Jan.	150	9,223	1,020	8,203	4,190	5,033	46,650	0	80,510	0	29,630	0
Feb.	150	8,331	126	8,502	2,260	6,071	14,870	0	51,950	0	7,540	1,088
March	700	35,725	291	35,434	671	35,054	3,460	32,265	5,980	29,745	20,880	14,845
April	900	44,450	368	44,082	356	44,094	1,360	43,090	915	43,535	12,840	31,610
May	1,200	61,242	1,060	60,182	93	61,149	156	61,086	400	60,842	257	60,985
June	1,000	49,389	193	49,196	80	49,309	142	49,247	224	49,165	150	49,239
July	100	6,149	98	6,051	108	6,041	139	6,010	189	5,960	155	5,994
Aug.	100	6,149	67	6,082	100	6,049	148	6,001	170	5,979	189	5,960
Sept.	100	5,950	30	5,920	178	5,772	101	5,849	110	5,840	122	5,828
TOTAL:	—	263,105	7,347	256,055	17,326	245,779	115,486	206,759	272,428	202,524	158,273	181,177

DEFENDANTS' EXHIBIT 13

United States
Department of the Interior

• • • • • • • • • • news release

FOR RELEASE TO P.M.'S FRIDAY,
OCTOBER 10, 1975

75-45-40

Reclamation in California:
Purpose-Practice-Propriety-Potential
Remarks by Gilbert G. Stamm
Commissioner of Reclamation,
U.S. Department of the Interior

to

California Water Resources Association
San Francisco, California, October 10, 1975

• • •

The largest single system among those that have been constructed over the last several decades is the Federal Central Valley Project. Thanks mainly to CVP, major rivers have been tamed, ground-water levels have been stabilized, major flooding has been prevented, and 6 million acre-feet of water is delivered yearly to farmlands and cities hundreds of miles distant from water supply sources.

The Federal control structures on San Joaquin Valley streams, combined with the facilities to control water in northern California and deliver it to the San Joaquin Valley, now provide much of the water that is used to irrigate some of the richest farmland in the world. The most recent

list of the 10 leading counties in the United States in farm productivity include five served by the Central Valley Project: Fresno County, number one in the nation; Tulare County, number two; Kern County, number three; San Joaquin County, number six; and Stanislaus County, number 10.

The project delivers water to 75 water districts ranging in size from the Westlands Water District of about 600,000 acres down to the Swinford Tract Water District of about 190 acres. It also serves directly about 130 individual water contractors, principally in the Sacramento Valley. We estimate there are some 12,500 small-farm families in the 1.8 million-acre San Joaquin Valley portion of the Central Valley Project. These family farmers directly benefit from the supply of Reclamation water. In addition, of course, water is supplied to numbers of farm enterprises where several parcels of individually-owned land are farmed as a single unit, and to some large corporate farms—all legally within the acreage limitations of Reclamation law.

During 1974, an ideal combination of weather and water supply conditions throughout the planting, growing, and harvesting months produced a favorable harvest season. Some 14 million tons of food and fiber valued at $1.8 billion were produced on 2.7 million acres of land in central and northern California and southern Oregon, the direct result of CVP and other smaller reclamation projects in the area.

Currently, our construction program in California is proceeding at a rapid rate. We are looking forward to completing about $1.25 billion of authorized new water conservation and conveyance facilities during the next 10 years. Meeting this schedule, of course, will depend heavily on Federal budgetary considerations and support from California for adequate funding levels. The principal developments now under construction are the Auburn Dam, the Westlands Water District distribution system, the San Luis Drain, and the Tehama-Colusa Canal, all in the Central Valley Project. We are also looking toward an early start on the San Felipe Division to supply water to the Santa Clara-Monterey-San Benito Counties area. Although not yet authorized, the Mid-Valley and Peripheral Canals could well be started during the next 10 years.

So much for the facts and figures. By themselves, they are most impressive, and on the surface indicate that all is going well in California.

But you know and I know that not all is going well. Californians today are involved in various types and degrees of controversy concerning water resource development, management, and operation policies comparable to the Central Valley Project authorization issues in the 1930's and the State Water Project authorization controversy in the 1950's and early 1960's. [2]

While differences of opinion exist between the Bureau of Reclamation and the State of California concerning the authority and latitude each has in carrying out its responsibilities and obligations in water resource operation and management, I do not see those differences as being the root cause of the controversy in California today.

The root causes, I believe, are differences of opinion between various groups of Californians with special or competing interest. The old North-South division still exists, but in addition you have the developers vs. preservationists, the water-haves and the water-have-nots, the divergent Delta interests, those concerned with long-range needs and those more concerned with the immediate future, who should call the signals and who should pay the bill.

You have those who advocate making more water available to produce food . . . to produce power . . . to meet the needs of homes and factories . . . to increase recreational opportunities . . . to expand the State's economic base . . . to expand social and cultural opportunities . . . to protect and enhance the environment . . . to build . . . to stop building . . . to dilute pollution . . . to repel salt water intrusion. Special interest groups in California are numerous, vociferous, and influential. And their causes are not without merit.

But their objectives are often conflicting and they tend to shift their support among the agencies whose policies best fit their own particular objectives.

There is little unanimity among the divergent interests; they are together on only a few issues, fragmented on most.

I don't mean to condemn them for this. Special interest groups have a right and an obligation to make their positions clear and to argue their own causes. But until such differences of opinion between divergent interests are resolved, neither we—nor the Department of Water Resources —nor the Water Resources Control Board can state with certainty that we are responding to the wishes of the people of California.

Before I finish these remarks, I plan to suggest a way to define more clearly the wishes of the people of California, but first I would like to discuss the differences which *do* exist between the Bureau of Reclamation and State agencies in California.

From the point of view of the Bureau of Reclamation, the basic difference stems from efforts within the State which appear to have the objective of dictating policies and regulations which would affect the daily operation of Federal

facilities and which would run counter to the authorized functions and obligations of Federal projects.

In stating that viewpoint, I do not mean to imply that we think the Federal Government should infringe upon the long-standing right of the State to allocate its water entitlements. [3]

We recognize that the ultimate right to store, divert, and utilize water in accordance with applications made pursuant to State law is one of the key elements of past, present, and future development in the West. Each state has the duty to determine under its own statutes how its unappropriated water is to be used.

Since 1902, the Bureau has consistently taken the position that it will obtain under State law its rights to store and divert water for its projects recommended for Congressional authorization. In fact, water right filings should be made for necessary water rights prior to the conduct of detailed studies, and in most cases this has been done. But certainly the water supply for a given project must be tied down prior to Congressional authorization. It would be foolish to do otherwise. Much time and money could be lost by interim filings.

However, we do maintain the position that once we have filed for water rights pursuant to State law and, through appropriate subsequent proceedings, which vary among States, have obtained the right to use designated blocs of water for designated purposes, the States cannot unilaterally dictate daily operations of the Federal facilities nor unilaterally dictate future changes in authorized uses. Nor could the Bureau adopt changes which would contravene statutory intent or obligation. This prerogative is reserved to the Congress of the United States.

On the other hand, it must be remembered that the Congress can modify and amend the laws under which we oper-

ate, when agreement can be reached on the justification therefore. Within statutory limitations, we frequently have considerable operational flexibility. We exercise that flexibility to the fullest to maximize the total benefits that can be derived, so long as, in so doing, we do not not jeopardize the authorized project functions. Flexibility can be expanded through judicious, coordinated system operation of facilities in a river basin, and can be further expanded by close coordination with others who own and operate water control facilities in the same basin. We strongly advocate this course.

We have historically operated Federal facilities in that manner including those of the Central Valley Project. Throughout the West, we maintain recreational pools in many reservoirs for use in the summer at levels as high as possible without jeopardizing other authorized functions such as flood control, irrigation, and power requirements. We maintain flood control space in reservoirs which were not authorized for flood control purposes, so long as we do not jeopardize the authorized water supply functions. We have on many occasions released huge volumes of water to repel salinity in the Delta, beyond any contract obligation, when such water was available. We have released water for fish and wildlife purposes and to maintain esthetically pleasing streamflows when water was available for such worthwhile objectives.

We have used our operational flexibility, usually in full coordination with operations by others, to maximize benefits and will continue this [4] policy—so long as the authorized functions of the Central Valley Project are not jeopardized. Beyond that, we cannot go without new or amendatory authorization from the Congress.

* * *[5]

I'd like to get back to what I see as the overriding problem in California—the conflict of competing groups and interests for control of California's existing and projected water resources—and what can be done about it.

The current planning program of the Bureau of Reclamation is being conducted in an atmosphere of total public involvement. Our objective is the general acceptance of a plan that does the most good for the most people both now and in the future.

Public involvement in the planning process brings special interest groups into the picture and provides an opportunity for objective consideration of all points of view. The careful weighing of special interest group proposals is part of the process of seeking common ground for reconciliation of differences.

Individuals come and go; issues come and go; political platforms come and go. People, I believe, are here to stay. Special interest groups include exploiters at one extreme and total preservationists at the other. Neither extreme can be condoned. Between these extremes are numerous well-meaning groups whose desires or demands must be blended with those of others.

Development has been basic to the economic growth and well-being of this State and this Nation, and to the society it supports. Wise development of resources is still basic to the continued growth of and well-being of California, the Nation and the world, but we must recognize that the world may go on for many generations and that our resources must be used wisely, to give assurance that our renewable resources of land and water will remain available for man's benefit in perpetuity.

In California, we have a Federal water program largely, but not totally, embodied in the Central Valley Project.

The State of California also has a water program, probably the greatest and most comprehensive of any State in the United States.

The Federal Central Valley Project and the California State Project have much in common and must be planned, developed, and operated in very close cooperation in order to maximize benefits of the two massive undertakings, or conversely, to avoid inefficiencies and loss of potential benefits. Differences in State authorities and obligations as compared to [6] Federal authorities and obligations must be taken into account. The common good must be given prime consideration. The contractual obligations of both must be taken into account, and, as far as either or both have flexibility for operation, the priority of objectives or project functions must be taken into account.

As mentioned previously, special interests are numerous, vociferous, and influential. One group may propose Federal legislation to its benefit while its close next-door neighbor may strongly oppose the very same piece of proposed legislation.

Because such differences exist, someone must assume the leadership in finding common ground between the philosophies and program advocacies of Southern California, the divergent Delta groups, the Sacramento Valley needs, the San Joaquin Valley needs on the east side, and on the west side, the Contra Costa County desires, and other competing needs.

How are we to reconcile differences of opinion as to what constitutes the wisest use of California's water resources? Who should attempt to reconcile those differences?

Since the Central Valley Project is an intra-State basin rather than inter-State, I suggest that the State of California officially assume the leadership in attempting to bring all interests together.

I want to assure you, however, that the Bureau of Reclamation is by no means passing the buck when I make that suggestion. We stand ready to cooperate with the State in public involvement meetings, in technical studies, in technical analyses, and in any other way in which we can be helpful in searching for common ground. Our only limitation may be funds and personnel. The Congress controls the funds, and OMB controls the personnel ceiling. Today we have 1,300 fewer people than we had 6 years ago, and 10,000 fewer than we had some 20 years ago, to perform a program that is greater by far than any in our history.

During the past two years, Reclamation has been conducting a Central Valley Project Total Water Management Study. That study is unique, not only because of its emphasis on water management rather than water development, but also the open public participation which is being encouraged.

Nearly 50 public meetings already have been held in connection with the study to obtain public views on needs and desires related to water management in the Central Valley. A recent series of meetings had as its principal purpose obtaining public views on specific water management proposals related to water supply and water marketing.

A significant part of the study effort will be dedicated to reanalyzing the Federal Central Valley Project. This reanalysis will consider how the project operation, authorizations, or structures can be modified so that the [7] Project can better meet today's needs. This type of reanalysis is needed because environmental, social, and energy con-

siderations are even more important today than they were when most of the project was authorized and constructed. Also, with 25 percent of California's water resources barred from development due to Wild River status of several northern rivers, with continuing overdraft of many groundwater basins, and with increasing drainage problems in many of the farmland areas, future water demands will surely tax all available experience and ingenuity.

We understand that the California Department of Water Resources is about to undertake a reformulation of the California Water Plan through a similar program.

I hope that we will be able to coordinate these two studies so that when they are completed, we will come up with, not a plan for the Central Valley Project and a plan for the State Water Project, but a new California Water Plan which will meet the needs of the vast majority of the people of California for generations to come.

The Federal and State objectives are similar, or ought to be, and we in Reclamation are willing to lend our support to mutual cooperation with the State in this effort.

The thrust of our joint effort should be toward maximizing benefits and minimizing detriments. If should focus on total water management, both in planning and in implementation, to maximize efficiency in water use so as to serve better the needs of people.

One prime example of better total water management is the Peripheral Canal which is, so far as I know, the most efficient means yet proposed for controlling water quality in the Delta. It could save, I understand, about a million acre-feet of water a year as compared to other methods of meeting similar water quality objectives in lean water years.

State and Federal technicians working together ought to be able to team up on studies to verify the amount of water that would be saved by the Peripheral Canal, and if such savings can be confirmed, I see no reason why all concerned should not lend their support to a joint Federal-State Peripheral Canal.

In order to arrive at a plan which will provide the greatest benefits for the largest majority of Californians, we must establish in our planning program an atmosphere of mutual trust and confidence not only between the Bureau of Reclamation and State agencies, but also between and among the representatives of the various interest groups involved.

Once that atmosphere has been established, we must lay all of our cards on the table, face up; all pros and cons must be exposed and explored. [8]

No surprises. No ulterior nor devious motives.

Once the proper atmosphere has been established and objectivity assured, we can clearly define and understand the differing positions . . . the reasons for those differences . . . and only then begin to draft solutions which undoubtedly will require much give and take.

We cannot expect only the special interest groups to participate in the giving and taking; representatives of the State and Federal governments also must be willing to do some giving as well as taking.

It is true that the State Water Resources Control Board and the Department of Water Resources operate under certain legislative limitations and obligations. The Bureau of Reclamation likewise has certain statutory limitations and obligations. But both we and the State agencies also have a certain amount of flexibility which we should be

willing to exercise to the fullest for the benefit of the people of California.

It is possible that through our joint efforts a new California Water Plan might be proposed which would require greater flexibility on the part of the Bureau—or the State—than is presently possible under existing legislation.

If such a plan were to receive unanimous or near-unanimous support from all of the interest groups involved, I see no reason why the legal impediments could not be removed.

I cannot speak for the State of California but I can assure you that, if our joint efforts reveal that amendatory legislation for the Federal program is necessary and justified and has strong general support from the affected State interests and beneficiaries, the Bureau of Reclamation will support such legislation.

I am not concerned nor fearful of our ability to obtain amendatory Federal legislation if the need is clearly defined, the justification is positive, and the support is strong.

But I would be less than honest if I did not tell you bluntly that, based on my own evaluation and longtime experience, if the conflicts now existing in California cannot be resolved, not only will amendatory Federal legislation not be forthcoming, but the support we now have for water resource development in California may well dry up. I cannot believe that is what the people of California want.

But unless the State of California takes the lead in determining the wishes of its citizens regarding future water resource development, management, and operation policies in the Central Valley, and elsewhere in the State, how are any of us to know for sure what the people of California *do* want? [9]

DEFENDANTS' EXHIBIT 16

[Received in evidence pursuant to order of U. S. Court of Appeals for Ninth Circuit, dated April 1, 1977, granting California's motion to augment the record on appeal]

State of Nevada
County of Humboldt. } ss.

I, GLADYS AUL, County Recorder in and for the County of Humboldt, State of Nevada, do hereby certify that:

The attached is a full, true and correct copy of an instrument in writing as the same appears of record in the Silver State, April 4, 1902 at Page ..... Book ..... of newspaper records of Humboldt County, Nevada.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my Official Seal this 21st day of December, A.D., 1976.

/s/ Gladys Aul
County Recorder in and for the
County of Humboldt, State of Nevada

[Seal]

Irrigation Bill Discussed with Members of House Committee

A Washington dispatch of April 2d says:

At the request of the President, the members of the House Irrigation Committee had a conference with him this morning lasting more than two hours, with reference to certain features of the irrigation bill, which had been criticised by Charles H. Maxwell, Prof. Pinchot of the Forestry division of the Agricultural department, and others. There were present at the conference Mr. Tongue, chairman of the committee, Representatives Mondell, Sutherland, Newlands and Terrill, Mr. Metcalf of California, Senator Dietrich of Nebraska, Prof. Pinchot and Mr. Maxwell.

The President discussed the question with the utmost frankness and without any attempt to force his views upon the commitee. The different criticisms were discussed at length, in which all those present joined.

One suggestion had been made to the President that the bill should be so amended as to prevent any person from obtaining a water right unless he was an actual, bona fide and permanent resident upon the land sought to be irrigated. Mr. Sutherland called attention to the fact that in Utah the farmers had settled in towns and villages, having their farms outside, and that such an amendment would have the effect of denying them the benefits of this law.

The President stated he recognized the force of this suggestion and was willing that the benefits of the bill should be confined to owners and occupants of the land, without actual residence thereon.

Congressmen Sutherland and Mondell strenuously insisted upon the provision for local control remaining in the bill, calling attention to the fact that each of the arid States had passed laws which were the result of years of experience with reference to the appropriation and use and distribution of the water; that these laws were now recognized as controlling the waters, but if the matter were turned over to national control much confusion and friction would result; that it would be unwise to have a divided control, and that inasmuch as it was purely a local matter the people of the various States were in better position to control the subject than officials in Washington, two or three thousand miles away. It was urged that as soon as a water right was acquired it became private property and should be held and enjoyed under State laws, and it was suggested that there was much doubt as to the

constitutionality of a law which would permit the national government to control the requirements and use of private property.

The President substantially acquiesced in this view, but expressed the fear that if the provision that State laws should control the appropriation of water should remain in the bill, it might be construed as permitting individual States to deny the right of citizens of one State to take water from another, and it was finally agreed that the bill should be so amended as to preclude any construction which would permit any State to deny to the citizens of another State the right to take water from the former into the latter.

DEFENDANTS' EXHIBIT 17

Water-Supply and Irrigation Paper No. 93

Series { I. Irrigation, 16
J. Water Storage, 10

Department of the Interior
United States Geological Survey
Charles D. Walcott, Director

PROCEEDINGS
OF
FIRST CONFERENCE OF ENGINEERS OF THE RECLAMATION SERVICE
WITH ACCOMPANYING PAPERS

Compiled By

F. H. NEWELL
Chief Engineer

Washington
Government Printing Office
1904

NOTICE OF APPROPRIATION OF WATER

[103] Section 8 of the reclamation act provides that the Secretary of the Interior, in carrying out the provisions of the act, shall proceed in conformity with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation. Before the filing of the first notice of appropriation of water in any state the matter of the advisability of making such filing should be submitted to the chief engineer, because some of the State laws may be such that it is impossible to comply

with them in conducting operations under the reclamation act.

The following is a general form of notice of appropriation of water, submitted as a guide for engineers who file such notices. Authority to act in the name of the Secretary of the Interior can be obtained by applying to the chief engineer, who will obtain the same from the Director, the latter being empowered by the Secretary of the Interior to designate suitable persons to act in his behalf.

* * *

In many cases it will be necessary to vary this form of notice in order to meet the requirements of the local laws. When such a notice has been prepared it is advisable to submit a copy to the United States district attorney, calling his attention to the instructions of the Attorney-General, dated September 14, 1903, providing for giving advice to the engineers of the reclamation service concerning the preparation of such notices, and requesting any suggestions which he may have to offer in regard to the form submitted. The original notice with evidence that it has been recorded in the proper State or Territorial office, should be promptly forwarded to the chief engineer.

DEFENDANTS' EXHIBIT 18

Water-Supply and Irrigation Paper No. 146

Series { I. Irrigation, 19
J. Water Storage, 12

Department of the Interior
United States Geological Survey
Charles D. Walcott, Director

PROCEEDINGS

OF

SECOND CONFERENCE OF ENGINEERS OF THE RECLAMATION SERVICE

WITH ACCOMPANYING PAPERS

Compiled By

F. H. NEWELL
Chief Engineer

Washington
Government Printing Office
1905

APPROPRIATION OF WATER.

[222] On page 103 of Water-Supply and Irrigation Paper No. 93 directions are given for the proper filing of notices of appropriation of water. Engineers are therein advised—

> to submit a copy to the United States district attorney, calling his attention to the instructions of the Attorney-General, dated September 14, 1903, providing for giving advice to the engineers of the Reclamation Service concerning the preparation of such notices, and requesting any suggestion which he may have to offer in regard to the form submitted.

It has been found necessary to caution engineers to follow this advice.

In several of the reclamation States laws were enacted in 1905 granting special privileges to the United States when appropriating water for the purpose of carrying out the provisions of the reclamation act. These, together with the statutory law governing appropriations in the other reclamation States, are summarized below.

It is important to follow strictly the provisions of law and the local regulations in filing notices of appropriation.

In the States where special laws have been enacted to govern appropriations by the United States the specific language of the law should be utilized and followed in giving the required notices.

The work required under the various statutes after filing notices differs under the various laws, and it is essential that the requirements in each case shall be followed as closely as possible.

Nothing will be gained by filing these notices unless their form and the subsequent proceedings comply with the provisions of the law, and, accordingly, these matters must be so ordered as to conform to the law and the regulations in all particulars so far as it is possible under the operations of the reclamation act.

In Arizona a notice[a] of the proposed appropriation must be posted at the place of intended diversion. A copy of the notice must be [223] filed for record in the office of the recorder of the county or counties in which the diversion and other works are situated, and a copy of the notice must also be filed in the office of the secretary of the Territory. The works must be constructed within a reasonable time after posting and filing the notice.

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[a] Water-Sup. and Irr. Paper U. S. Geol. Survey No. 93, 1904, p. 103.

In California a notice[a] of the proposed appropriation must be posted at the point of intended diversion, and a copy must be recorded in the office of the recorder of the county in which it is posted within ten days. Work must be begun within sixty days and prosecuted diligently and uninterruptedly to completion.

In Colorado, within sixty days after commencing construction, statements and maps in duplicate must be filed with the State engineer for his approval. After approval by the State engineer the claimant must file duplicate map and statement thus approved in the office of the county clerk and recorder of the county in which the headgate of the canal or the reservoir is situated. Blank forms for this statement and directions for preparing maps can be obtained upon application to the State engineer. Engineers are requested to keep copies of such forms and directions on file in their office and to follow them carefully in making an appropriation of water.

In Idaho an application must be made to the State engineer for permission to make an appropriation. Engineers are requested to keep on file in their office copies of printed forms and directions furnished by the State engineer, and are cautioned to abide by all the rules and regulations of the State engineer's office in making an appropriation.

In Kansas a notice[a] of the proposed appropriation must be posted at the point of intended diversion, and within ten days thereafter a copy of the same must be posted in a conspicuous place in the office of the county clerk of the county in which the diversion is situated and be recorded by the county clerk. Work must commence within sixty days and be prosecuted diligently.

[a] Op. cit., p. 103.

In Montana a notice[a] of the proposed appropriation must be posted at the point of intended diversion, and a verified copy must be filed within twenty days with the county clerk of the county in which the diversion is made.

By an act of the Montana legislature approved February 27, 1905, all appropriations made in behalf of the United States by persons duly authorized by the Secretary of the Interior shall be held valid for the period of three years after the filing of the notice as above described, and no part of the waters designated in the notice shall be subject to other appropriation for three years unless a notice of abandonment of the irrigation project is filed under authority from [224] the Secretary of the Interior with the county clerk and recorder of the county in which the original notice was filed.

In Nevada the same procedure must be followed as in Idaho.

In New Mexico, by an act approved March 16, 1905, it is provided that whenever the proper officer of the United States shall notify the State engineer that the United States intends to utilize certain specified waters, such waters shall not be subject to further appropriations, except in so far as formally released in writing by a duly authorized officer of the United States.

In North Dakota, by an act approved March 1, 1905, it is provided that whenever the proper officer of the United States shall notify the State engineer that the United States intends to utilize certain specified waters, such waters shall not be subject to other appropriation for a period of three years from the date of said notice, except in so far as formally released in writing by the proper officer of the

[a] Op. cit., p. 103.

United States. Before the expiration of the three-year period plans of the proposed work must be filed in the office of the State engineer.

In Oklahoma the statutory provisions covering this subject are the same as those in North Dakota, stated above.

In Oregon, whenever the proper officer of the United States shall file in the office of the State engineer a written notice that the United States intends to utilize certain specified waters, such waters shall not be subject to further appropriation for a period of three years from the date of filing such notice, within which time final plans of the proposed works must be filed with the State engineer. Construction must be authorized by the United States within four years of the date of the original notice. No part of the waters so appropriated shall be subject to other appropriation within the period stated above, unless formally released in writing by a duly authorized officer of the United States, which release shall be filed in the office of the State engineer.

In South Dakota the statutory provisions covering this subject are the same as those in North Dakota, stated above.

In Utah the same procedure must be followed as in Idaho.

In Washington, by an act approved March 4, 1905, it is provided that whenever a duly authorized officer of the United States shall notify the commissioner of public lands that the United States intends to make examinations or surveys for the utilization of certain specified waters, the waters so described shall not be subject to other appropriation for a period of one year from the date of receipt of such notice by the commissioner of public lands, unless formally released in writing by a duly authorized officer of

the United States. If, before the expiration of the one-year period, a duly authorized officer of the United States shall certify in writing to the commis [225] sioner of public lands that the project contemplated in such notice appears to be feasible and that the investigation will be made in detail, the waters specified in such notice shall not be subject to other appropriation for the further period of three years following the date of receipt of such certificate, and such further time as the commissioner of public lands may grant upon application of a duly authorized officer of the United States and notice thereof first published once a week for four consecutive weeks in a newspaper published in each county in which the works are to be constructed.

In Wyoming the same procedure must be followed as in Idaho.

* * *

DEFENDANTS' EXHIBIT 19

58TH CONGRESS, *2d Session.* } House of Representatives, { DOCUMENT No. 44.

Department of the Interior
United States Geological Survey
Charles D. Walcott, Director

SECOND ANNUAL REPORT OF THE RECLAMATION SERVICE

1902-3

F. H. NEWELL
Chief Engineer

Washington
Government Printing Office
1904

• • •

[33] STATE LAWS.

Section 8 bears upon the relation with State laws, prevents interference with vested rights acquired thereunder, and directs the Secretary of the Interior, in carrying out the provisions of the reclamation act, to proceed in conformity with such laws. It, however, makes a very important declaration that the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. As the laws of many of the States and Territories relating to water are in a more or less chaotic condition, the declaration as to appur-

tenance to the land irrigated, and beneficial use, helps to solve some of the problems which otherwise would be extremely serious.

In order to carry out the provisions of this section, careful study must be made of the effect of State laws upon each project under consideration in that particular State. It appears probable that in some of the States radical changes in the laws must be made before important projects can be undertaken. In one of the States—Nevada—the legislature has recognized the importance of action and has passed laws intended to supplement the reclamation law and to assist in carrying out its purpose.

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DEFENDANTS' EXHIBIT 20

58TH CONGRESS, *3d Session.* } House of Representatives, { DOCUMENT No. 28.

Department of the Interior
United States Geological Survey
Charles D. Walcott, Director

THIRD ANNUAL REPORT OF THE RECLAMATION SERVICE

1903-4

(Second Edition)

F. H. NEWELL
Chief Engineer

Washington
Government Printing Office
1905

* * *

[31] STATE LAWS.

Section 8 bears upon State laws and vested rights. It brings about the need of a more or less complete study of existing systems of water appropriation and necessitates taking up with State officials [32] and legislators many details of State laws or proposed amendments. It is very important to secure as nearly a uniform system of laws in the various States as may be consistent with the different physical conditions, and it is believed that as time goes on the State laws will be brought into greater harmony with one another and with the necessities of irrigation development.

* * *

DEFENDANTS' EXHIBIT 21

59TH CONGRESS, *1st Session.* } House of Representatives, { DOCUMENT No. 86.

Department of the Interior
United States Geological Survey
Charles D. Walcott, Director

FOURTH ANNUAL REPORT OF THE RECLAMATION SERVICE

1904-5

F. H. NEWELL
Chief Engineer

Washington
Government Printing Office
1906

* * *

[23] STATE LAWS.

Section 8 bears upon State laws and vested rights. It brings about the need of a more or less complete study of existing systems of water appropriation and necessitates taking up with State officials and legislators many details of State laws or proposed amendments. It is very important to secure as nearly a uniform system of laws in the various States as may be consistent with the different physical conditions, and it is believed that as time goes on the State laws will be brought into greater harmony with one another and with the necessities of irrigation development.

* * *

PLAINTIFFS' EXHIBIT 1

United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

Oct 4 1972

Honorable Kent Frizzell
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D. C. 20530

Dear Mr. Frizzell:

I am advised that the Honorable Charles B. Renfrew, Judge of the United States District Court, Northern District of California, has requested that he be furnished with a statement by the United States of its position in connection with the applicability to the United States of America of Decisions 1379 and 1400, rendered by the California State Water Resources Control Board.

The position of the United States regarding these Decisions by the State Water Resources Control Board has been the subject of exhaustive study and careful consideration by this Department. We have concluded that the United States of America cannot be made subject to any terms or conditions imposed by a state agency which would in any way interfere with or affect the operation of Federal Projects for the purposes for which such Projects were authorized by Congress.

Both Decisions 1379 and 1400 purport to require the release of Federal water stored behind Federally constructed dams for purposes other than those contained in the authorizing

legislation. The Central Valley Project as a federal project cannot without the consent and approval of Congress be required to provide water for nonproject purposes to the impediment of its Congressionally authorized project purposes. The attempt by the State Water Resources Control Board to impose upon the United States terms and conditions requiring the release of stored water from Federal Reservoirs would, in my opinion, interfere with the operation of the Project by the United States and would be violative of the Congressional enactments authorizing the Project. The terms and conditions which the Board has attempted to impose upon the United States could result in interference with such authorized purposes as power production, recreation, navigation, and water deliveries pursuant to contracts entered into and authorized in accordance with Federal statutes.

We would point out, however, that operation of the Central Valley Project to meet authorized purposes has provided significant water quality benefits in the Central Valley and the Sacramento-San Joaquin Delta. Project releases into the Sacramento and American Rivers maintain flows which provide substantial dilution of low quality inflows. Project operations have restricted salinity intrusion into the delta to a level far below that which would occur under natural conditions. The Department will continue to voluntarily assist in improving water quality in the Central Valley of California to the extent it can be done consistent with the objectives and requirements of the Project as authorized by Congress.

Sincerely yours,

(sgd) JAMES R. SMITH
James R. Smith
Assistant Secretary
of the Interior [2]

PLAINTIFFS' EXHIBIT 2

County of Sacramento
State of California—ss.

AFFIDAVIT OF RICHARD J. DAUBER

Richard J. Dauber, being first duly sworn, deposes and says:

That I am Assistant Regional Solicitor, Sacramento Region, Office of the Solicitor, Department of the Interior;

That I have reviewed the files and records in the office of the Regional Solicitor relating to the hearings before the State Water Resources Control Board on Applications 14858, 14859, 19303, and 19304 which culminated in Decision 1422 by said Board;

That I personally took part in the hearings before said Board which culminated in Decisions 1379 and 1400;

That it has been the standard practice and procedure of the Bureau of Reclamation and its attorneys at such water rights hearings to advise the said Board that it has no jurisdiction or power to condition water right permits issued to the said Bureau;

That this position was clearly set forth in the Opening Brief of the United States dated January 31, 1973, and filed with the said Board in the Applications 14858, 14859, 19303, and 19304 which culminated in Decision 1422;

That the Board has also been advised in the course of other hearings on water right applications by the Bureau of Reclamation that the said Bureau was appearing in the interest of comity and that the Bureau does not recognize the jurisdiction of the Board over the Bureau;

That other instances in addition to the one above cited where the Board has been advised of the Bureau's position

on the jurisdiction of the Board are found in the official transcript of the proceedings In the Matter of Applications 5625, 5626, 9363-9368, and 10588 leading to Decision 990 at pages 1716, 3317, 6587, and numerous other pages; in the official transcript of the proceedings In the Matter of Applications 5625 and 38 other Applications leading to Decision 1379 at page 1689; in the official transcript of the proceedings In the Matter of Application 18721 leading to Decision 1400 at page 122.

That there are also briefs and letters sent to the Board which enunciate the Bureau's position of the lack of jurisdiction of the Board over the United States Bureau of Reclamation.

RICHARD J. DAUBER

Richard J. Dauber

Official Seal
NATALIE J. VINSON
Notary Public California
County of Sacramento
My Commission Expires March 2, 1975

Subscribed and sworn to before me this 10th day of October, 1974.

NATALIE J. VINSON [2]

PLAINTIFFS' EXHIBIT 3

United States Department of the Interior
Bureau of Reclamation
Washington, D.C. 20240

Aug 29 1974

In Reply Refer to: 736 510.

Honorable Ronald Reagan
Governor of California
Sacramento, California 95814

Dear Governor Reagan:

Thank you for your letter of June 28 expressing your concern about the criticism of the terms of water rights decision D-1422 issued by the California Water Resources Control Board.

As you point out, the decision does not detract from the flood control benefits of the New Melones project. It also finds that the water quality and fish and wildlife benefits of the project have been demonstrated.

Unfortunately, the decision does place restrictions upon the operation of New Melones Dam, Reservoir, and Powerplant that seriously impair the authorized project purposes. Some of the purposes; for example, irrigation, municipal and industrial water, and recreation, would be severely restricted or even eliminated in favor of maintaining a "white water" area. Interestingly, the "white water" area was made possible largely from upstream reservoir releases for power development and downstream irrigation rather than due to natural conditions.

If the New Melones Reservoir were to be operated in accordance with the terms of the decision, no firm power yield would be possible. The estimated electrical output of 430 million kilowatthours annually would serve the needs of a city of approximately 200,000 people. In order to generate that amount of power in an oil-fired thermal plant would require over 600,000 barrels of oil annually. Certainly the existing energy shortage should make the provision of that quantity of energy from pollution-free sources a highly desirable function to be served by New Melones.

The water supply which would be conserved by the New Melones Reservoir would meet the needs of both agricultural and municipal and industrial uses within the Stanislaus River Basin, as provided in the authorization, and in other service areas of the Central Valley Project to the extent of the remaining available water. We already have received requests for water from local counties and other water users which exceed the reservoir yield several times. The increasing need for agricultural production in California reinforces the previously determined need for an increased water supply.

We understand that, initially, the New Melones Reservoir, if operated as authorized by the Congress, would provide an estimated 850,000 recreation days of use annually. Ultimately, the annual use would increase to 3 million recreation days. The restrictive operations imposed by D-1422 would substantially impair such recreational use due to the relatively small amount of water which would be in the reservoir during the summer recreational months.

We are please that you continue to support the New Melones project. However, we hope you will reconsider the

desirability of implementing D-1422 in view of the greatly increased benefits which would be provided within California and the increase in people to be served by the project as authorized by Congress.

Sincerely yours,

G. G. STAMM
Commissioner

bcc:
Regional Director, Sacramento, California
Chief, Division of Planning Coordination, E&R Center
(w/c of incoming to each)

PLAINTIFFS' EXHIBIT 4

County of Sacramento
State of California—ss.

AFFIDAVIT OF JOHN R. MORGAN

John R. Morgan, being first duly sworn, deposes and says:

That I am Chief, San Joaquin Branch, Planning Division, Mid-Pacific Region, Bureau of Reclamation, Department of the Interior;

That as Chief, San Joaquin Branch, I have supervision over planning activities of Bureau of Reclamation projects in the San Joaquin Valley, California, including New Melones Dam and Reservoir which by P. L. 87-874 is to be integrated into the Federal Central Valley Project;

That I have reviewed the Decision 1422 rendered by the State Water Resources Control Board on Applications 14858, 14859, 19303, and 19304;

That the Decision places severe restrictions on the operation of New Melones Dam, Reservoir and Powerplant that would seriously impair the authorized purposes of the project which include full integration with the Central Valley Project. These purposes which would be impaired include: irrigation, municipal and industrial water, power, reservoir recreation, and fish and wildlife enhancement. These would either be severely restricted or eliminated under terms in the Decision. There are other requirements, which if complied with, would have the effect of placing the final supervision of the operation of the New Melones Project under the jurisdiction of the State Water Resources Control Board without any stated operations criteria.

That several requirements contrary to the authorization are imposed by the Order. These are referred to by the numbered conditions and limitations in the Order;

Conditions 1-a and 1-d. These portions of the Order provide that until further order of the Board, the water appropriated shall be used only for preservation and enhancement of fish and wildlife, recreation, and water quality control purposes. Under Condition No. 2 provision is made for these same purposes and for meeting prior rights. The Board refused, therefore, to allow any direct use or storage of water for consumptive uses (irrigation and municipal and industrial purposes) above that required to meet prior rights. These Conditions also do not provide for any storage of water in New Melones Reservoir specifically for recreation and power purposes.

As provided in the authorization of the project, New Melones Reservoir would be fully integrated with Central Valley Project with the water supply conserved by the New Melones Reservoir used to meet the needs of both agricultural and municipal and industrial uses within the Stanislaus River Basin, and in other service areas of the Central Valley Project to the extent of the remaining available water. The project authorization includes provisions for recreation enhancement and power production at New Melones Dam and Reservoir.

Condition 2. This condition again is similar to 1-a and 1-d in that storage is limited until further order of the Board for the purposes specified (downstream fishery enhancement, water quality, prior rights, and flood control).

The condition, however, also specifically provides that no storage shall be allowed for power and recreational purposes. The Decision further provides that before any further order of the Board in regard to additional impoundment is considered it "shall be preceded by a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the permittee has firm commitments to deliver water for such other purposes. The Board reserves jurisdiction for the purpose of establishing dry year criteria at the time such impoundment is approved." This creates a dilemma since the United States must have an assured water supply before entering into water service contracts. Further, if such power were to rest with the Board, it would effectively place every acre-foot of water stored for conservation use—including power—under complete control of the State Board, which would be directly contrary to the authorization.[2]

New Melones Reservoir if operated as authorized by the Congress would provide initially an estimated annual use of 850,000 recreation days with an estimated full development use of three million recreation days. The restrictive operations imposed by Decision 1422, without subsequent

action by the State Water Resources Control Board, would substantially impair such recreational use as a result of the restrictions in the amount of water which could be stored in the reservoir during the summer recreational season. Furthermore, with reduced storage and no minimum pool permitted, the lake fishery would be severely restricted.

Condition 3. This Condition requires that a reservoir operation study be submitted to the Board before any water is impounded in the reservoir. The study is required to be updated every five years. The details of the proposed reservoir clearing plan also are required to be included as part of this study to show how clearing will progress as additional storage is "authorized." Under this condition the Board again assumes functions already granted by Congress in the authorization to the Secretary of the Interior and the Secretary of the Army. The Board would obtain on its own initiative, operating control, not only of how much and when water was permitted to be stored, but also of what reservoir clearing was done. Staged reservoir clearing apparently contemplated by the Board would be more costly and perhaps more disruptive to the environment that the overall clearing which would be done by the Corps of Engineers during project construction. This Condition is contrary to the authorization.

Condition 4. The Board under this Condition would "authorize" use of water for consumptive purposes only in San Joaquin, Stanislaus, Calaveras, and Tuolumne Counties. Further, it states that a petition to amend the permits is required to include other specific areas which will be considered upon a showing that water from other CVP sources is not available to serve such areas. This countermands the authorized integration of New Melones Unit into the Central Valley Project.

As provided in the authorization of the project, the water supply conserved by the New Melones Reservoir would be used to meet the needs of [3] both agricultural and municipal and industrial uses within the Stanislaus River Basin, and in other service areas of the Central Valley Project to the extent of the remaining available water as determined by the Secretary of the Interior. The Decision would obviate this determination by limiting service to these four counties and by only providing for possible further use of water outside of these counties after the Board's favorable consideration of a petition to be filed with the Board by the Bureau. The Board, under this Condition, assumes operating control which is placed by the authorization in the Secretary of the Interior.

Condition 5. This Condition states criteria to be used for water quality control purposes. The total dissolved solids concentration at Vernalis is stated to be 500 parts per million or less. The dissolved oxygen concentration in the Stanislaus River is stated to be "as specified in the Water Quality Control Plan (Interim), San Joaquin River Basin 5C, State Water Resources Control Board, June 1971."

The Condition further states, "In the event that the Water Quality Control Plan (Interim) is amended or superseded, the foregoing water quality objectives shall be modified to conform to the then current criteria.

The two criteria stated are not those reported to Congress in conformity with the authorization.

The provision included by the Board for modifying the water quality objectives would be contrary to the criteria presented to Congress in conformity with the authorization and would permit taking up to the full yield of New Melones for this purpose if the revised criteria so required.

Condition 6. The State Water Resources Control Board reserves jurisdiction over the permits for the purpose of revising water release requirements for water quality and fish releases pursuant to additional studies.

Under such jurisdiction there is no assurance that the water service functions authorized by the Congress could be realized. Since most of these functions are sources of revenue, project financial integrity would be threatened. As stated in previous response to Condition 5, the water [4] quality releases were reported to Congress in conformity with the authorization and further agreed upon in the memorandum of agreement between the Central Valley Regional Water Quality Control Board and the Bureau of Reclamation. The project fish releases were previously studied and agreed upon by the State Department of Fish and Game, the U. S. Bureau of Sport Fisheries and Wildlife, and the Bureau of Reclamation.

Condition 7. This Condition would place additional requirements on the Bureau to monitor and report on downstream diversions. The Bureau of Reclamation is not authorized to police diversions under water rights held by others.

Condition 8. This Condition also would place additional requirements on the Bureau to obtain and keep additional records which would necessitate additional expense not authorized. Funds for additional work would have to be contingent upon appropriations by Congress and would need to be within the scope of the project authorization.

Condition 9. Under this Condition the maximum quantities of water stated in the Decision for appropriation at New Melones could be reduced if investigation warrants. This would again leave determination of how much water could be used and stored at the Board's discretion which

is contrary to the authorization and could threaten the financial integrity of the project.

Condition 13. This Condition provides that: "All rights and privileges under this permit including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water." In addition, it states that: "Permittee may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (3) suppressing evaporation losses from water surfaces; (4) controlling phreatophytic growth; and (5) installing, [5] maintaining and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project."

All of these indicated measures and general areas of control to be exercised by the Board as included in these Conditions would place the operation and maintenance of the New Melones Project under the control of the Board. This is contrary to the authorization which expressly states that the operation and maintenance of New Melones shall be by the Secretary of the Interior, pursuant to Federal Reclamation Laws, except for the flood control aspects which would be in accordance with rules and regulations prescribed by the Secretary of the Army.

This Condition would obligate the Bureau to make expenditures at the discretion of the Board with no provision for reimbursement.

Condition 15. This Condition would allow the Board to exercise or delegate to others access to the Project to determine compliance with the specified terms. This has the effect of again placing the project operation under the Board's control rather than under the Secretary of the Interior in accordance with the authorization. It would compromise the Secretary's responsibility for the security of Federal works.

Condition 17. This Condition would require the installation and maintenance of an outlet pipe of adequate capacity near the bottom of the natural stream channel "or provide other means satisfactory to the State Water Resources Control Board" for release of water not authorized for appropriation. The additional outlet pipe, if required by the Board, is not included in the designs and would involve considerable additional costs to install and operate. The most significant language in this Condition is "or provide other means satisfactory to the State Water Resources Control Board" which gives the Board final rights to approve designs by which inflow can be released. The Board may have the right to be assured the designs will do this but not the right to select the means. The completed outlet facilities are designed to operate (except for emergency reservoir [6] evacuation) down to a minimum reservoir pool which is not allowed by the Board's order.

Condition 20. This provision would make it possible for the Board at any time to decide that some portion or all of the yield of New Melones Reservoir would be used for water quality purposes regardless of commitments to meet other needs and uses. It again would give complete control to the Board directly contrary to the authorization and threatens the financial integrity of the project.

Condition 22. This provision again places complete control of the construction and operation of the project with the Board. This is contrary to the authorization which vests that authority with the Secretary of the Army and the Secretary of the Interior.

Condition 25. This provision places the Board's interpretation on the primary place of use of water as being wherever needed within the four counties of origin. This is contrary to the authorization which requires the Secretary of the Interior to determine the quantity of water required to satisfy all existing and anticipated future needs within "the Stanislaus River Basin" which may or may not coincide with the counties of origin.

That the Decision also contains conditions contrary to the method of operation proposed by the Bureau of Reclamation and the Corps of Engineers as follows:

Condition 3. This Condition requires that a reservoir operation schedule be filed which would show the "manner in which clearing will progress as additional storage is authorized." This Condition would prohibit the full operation of New Melones Unit as planned and its integration with the Central Valley Project. The staged clearing of the reservoir which the Order contemplates also would be contrary to the effective construction plan developed by the Corps of Engineers.

Condition 6. This Condition would prevent the Bureau from having any assurance that the project could be operated as planned since the Board under the jurisdiction retained could change the basic operational criteria. [7]

Condition 9. Under this Condition the Board could reduce the quantities of water for direct use and storage at New Melones. Such provision for future change would impair the planned integrated operation of New Melones

Unit with Central Valley Project and could severely affect the accomplishments and revenues obtained.

Condition 17. The proposed method of operation of New Melones Reservoir for releasing water storage would include provisions to deliver water from an intake structure located at about elevation 750 feet, which is 58 feet below the 310,000 acre-feet minimum pool elevation of 808 feet. Provision of this minimum pool, although not specifically included in the authorizing act itself, was provided for in the project authorization by inclusion in the supporting document (H.D. 453). This type of operation does not contemplate nor require installation and operation of the outlet facilities indicated in Decision 1422 which states that "permittee shall install and maintain an outlet pipe of adequate capacity in his dam as near as practicable to the bottom of the natural stream channel, or provide other means satisfactory to the State Water Resources Control Board, in order that water entering the reservoir which is not authorized for appropriation under this permit may be released." The completed outlet facilities (which were essentially completed at the time D-1422 was issued) were not designed to permit release of water at streambed elevation except for emergency evacuation of the reservoir. The specific requirement for low level outlet facilities in the Decision would place considerable additional costs and operational constraints on the project which are not planned or deemed necessary in the designs and operation of the project as authorized. The minimum pool operation proposed by the Bureau would permit release of any water which was required for downstream use.

Condition 20. Under this Condition the Board could determine that a substantial increase in water releases should be made to meet future water quality objectives.

With such potential for a required operational change, the Bureau could not effectively plan nor control the [8] operation of the project. The entire yield of the reservoir might be required by the Board. The accomplishments and financial integrity could be impaired by future determination by the Board.

Condition 22. This Condition requires that any change in the project which the Board determines to be substantial shall be approved by the Board. Congress requires that any substantial change in the authorized project receive its approval. The Board's condition establishes a hiatus.

/s/ JOHN R. MORGAN
John R. Morgan

Official Seal
NATALIE J. VINSON
Notary Public, California
County of Sacramento
My Commission Expires
March 2, 1975

Subscribed and sworn to before me
this 11th day of October, 1974.
/s/ NATALIE J. VINSON [9]

PLAINTIFFS' EXHIBIT 5

County of Sacramento
State of California } ss.

AFFIDAVIT OF J. ROBERT HAMMOND

J. Robert Hammond, being first duly sworn, deposes and says:

That I am Assistant Regional Director, Mid-Pacific Region, Bureau of Reclamation, Department of the Interior;

That as Assistant Regional Director I have general supervision over all operational activities of the Mid-Pacific Region;

That I graduated from Purdue University in 1936 with a B.S. degree in electrical engineering;

That I am a member of the Western Systems Coordinating Council which Council consists of representatives of the major power producers in western United States and Western Canada;

That I personally supervised power operations of the Central Valley Project for four years as Chief of Operations;

That I have read and am familiar with Decision 1422 issued by the State Water Resources Control Board on Applications 14858, 14859, 19303, and 19304;

That the operation of New Melones Reservoir in accordance with conditions and limitations set forth in D-1422 would (1) reduce the average annual energy generation from 430 million kilowatt-hours to 192 million kilowatt-hours, and (2) reduce the firm capacity from 255 megawatts (at 10% plant factor) to zero;

That the average energy generation would be reduced because (1) the average head on the powerplant would be reduced from 506 feet to about 325 feet, and (2) the average annual flow through the powerplant would be reduced by 310,000 acre-feet. The reduced flow through the powerplant reflects the releases that would be made each year below elevation 808 feet—the minimum elevation at which the authorized powerplant can be operated;

That the firm capacity would be reduced to zero because the firm capacity of a powerplant must be available each and every month of the year. Operating under D-1422, the reservoir would be drawn down to zero power head. Under that condition the powerplant could not generate;

That the power benefits associated with the 192 million kilowatt-hours are about $1,930,000 annually. This amount of power benefits would not be sufficient to justify the powerplant investment as presently authorized;

That the existing Pacific Gas and Electric Company's Melones Powerplant, which generates an average of 117 million kilowatt-hours annually, will be inundated by New Melones Reservoir. Operating in accordance with D-1422 will not change this situation. Thus, this power would no longer be available.

/s/ J. ROBERT HAMMOND
J. Robert Hammond

Official Seal
NATALIE J. VINSON
Notary Public · California
County of Sacramento
My Commission Expires March 2, 1975

Subscribed and sworn to before me
his 11th day of October, 1974

/s/ NATALIE J. VINSON [2]

PLAINTIFFS' EXHIBIT 6

United States
Department of the Interior
Bureau of Reclamation
New Melones Unit
Central Valley Project, California

Memorandum of Agreement for the Protection and Enhancement of the Water Quality of the Stanislaus and San Joaquin Rivers as Affected by the New Melones Project Under Water Right Application 19304 of the United States of America and by Municipal and Industrial Wastes

WHEREAS, the United States intends to construct a dam and reservoir in and across the Stanislaus River at a point upstream from Oakdale, Stanislaus County, California, and will utilize said dam and reservoir and their related works for the diversion and storage of water of the Stanislaus River primarily for flood control, domestic, irrigation, recreation, municipal and industrial, fish culture, and water quality control purposes and for the generation of hydroelectric energy; said dam to be known as New Melones Dam and the Reservoir created thereby to be known as New Melones Reservoir; and

WHEREAS, the United States has filed an application and is seeking to obtain a permit and license to appropriate and apply to beneficial use waters of the Stanislaus River and its tributaries in connection with the operation of the New Melones Dam and Reservoir, such application being designated in the files of the California State Water Resources Control Board as number 19304; and

WHEREAS, the Central Valley Regional Water Quality Control Board with respect to its Region has the duty to

obtain coordinated action in water quality control and in the abatement, prevention and control of water pollution and nuisance; and

WHEREAS, the beneficial uses of the Stanislaus and San Joaquin Rivers are dependent upon water quality conditions, and the parties recognize that water quality conditions may be protected and enhanced by facilities constructed and operated under a permit and license issued on Application 19304; and

WHEREAS, authority to investigate the need for water quality control is contained in the Federal Water Pollution Control Act amendments of 1961 (Public Law 87-88, approved July 20, 1961) which provides in part

> ". . . in the survey or planning of any reservoir of the Corps of Engineers, Bureau of Reclamation, or other Federal Agency, consideration shall be given to inclusion of storage for regulation of streamflow for the purpose of water quality control . . ."

and, in addition, the 1962 Flood Control Act authorizing the New Melones Project (Public Law 87-874) provides

> ". . . that the Secretary of the Army give consideration during the preconstruction planning for the New Melones Project to the advisability of including storage for the regulation of streamflow for the purpose of downstream water quality control . . .;"

and

WHEREAS, cooperative studies by the Public Health Service, Bureau of Reclamation, and Corps of Engineers of water quality requirements in Stanislaus River and lower San Joaquin River for irrigation, fish, and other purposes were made demonstrating the feasibility of adding water quality control as a function of the New Melones Project; and

WHEREAS, the construction of the New Melones Dam by the United States and operation, as provided in this agreement, will assist in providing protection and enhancement of the quality of the waters of the Stanislaus and San Joaquin Rivers and it is mutually beneficial and desirable that the parties formalize their understanding by this memorandum of operating agreement:

NOW, THEREFORE, the United States acting by and through the Bureau of Reclamation, hereinafter called the Bureau, its successors and assigns, and the State of California, acting by and through its Central Valley Regional Water Quality Control Board, hereinafter called the Regional Board, its successors and assigns, and in consideration of the premises contained agree as follows:

1. The Bureau shall, in addition to fishery requirements, release from New Melones Dam, for water quality control purposes in the downstream reaches of the Stanislaus River and in the San Joaquin River below the [2] confluence of the two rivers, flows necessary to maintain the objectives listed below, but not in excess of 70,000 acre-feet in any one year. Releases of water for quality control purposes shall be scheduled to maintain the oxygen level at or above 5 milligrams per liter (mg/l) in the Stanislaus River and the level of total dissolved solids not to exceed a mean monthly concentration of 500 mg/l in the San Joaquin River immediately below the mouth of the Stanislaus River. PROVIDED: that if hydrologic or other conditions prevent maintenance of a 500 mg/l TDS level on a mean monthly basis during the entire year in the San Joaquin River immediately below the mouth of the Stanislaus River, operational releases of the water quality reservation will be restricted to the irrigation season in accordance with irrigationists' needs.

2. The Bureau shall make all reasonable efforts to perfect and protect water rights necessary for the water quality reservation and for water quality operational purposes.

3. The Regional Board shall make all reasonable efforts to support the Bureau to obtain and protect water rights for the water quality reservation of this project and to protect the water released for water quality control purposes.

4. Should the Bureau assign, convey or otherwise dispose of any interest in this project or rights pursuant to Application 19304, such disposition shall expressly be made subject to the provisions of this agreement.

5. The Bureau and the Regional Board hereby agree that the provisions of this agreement should be included by way of reference or otherwise in any permit or license by the State Water Resources Control Board of California pursuant to Water Right Application 19304. [3]

Dated: This 2d day of July, 1969.

UNITED STATES BUREAU OF RECLAMATION

By R. J. REDFORD JR.
Regional Director Region 2

CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD

By JOHN VAN ASSEN
Chairman, Central Valley Regional Board

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 77-285

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

SANFORD SAGALKIN,
Deputy Assistant Attorney General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-11, Pet. App. 12-16) are reported at 550 F.2d 1239 and 558 F.2d 1347. The opinion of the district court, which is reported at 403 F. Supp. 874, was omitted from petitioners' appendix and is reproduced as Appendix A to this brief in opposition (pp. 1a-67a, *infra*). A copy of Decision 1422 of the California State Water Resources Control Board is being lodged

with the Clerk of the Court. The part of Decision 1422 which contains the Board's order is reproduced as Appendix B to this brief (pp. 68a-77a, *infra*).

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1977. (Pet. App. 1-11). A timely petition for rehearing was denied in an opinion dated August 12, 1977 (Pet. App. 12-16). The petition for a writ of certiorari was filed on August 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (Pet. 1).[1]

QUESTION PRESENTED

Whether Section 8 of the Reclamation Act of 1902 (43 U.S.C. 383) authorizes a State, in issuing permits to the United States to appropriate water necessary for the operation of a federal reclamation project, to impose on those permits conditions regarding, among other things, the amount of water flow, method of water diversion, water quality, construction techniques, preservation of flora and fauna, and preservation of recreational opportunities.

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[1] By letter of October 13, 1977, petitioners notified the Court that the citation to 28 U.S.C. 1257(3) (Pet. 1) should read 28 U.S.C. 1254(1). Petitioners also suggest (Pet. 1) that this Court has jurisdiction under 28 U.S.C. 1254(2), but since the court of appeals based its decision solely on construction of Section 8 of the Reclamation Act of 1902, 32 Stat. 390, as amended, 43 U.S.C. 383, and did not consider the validity of any state statute, this Court's jurisdiction rests exclusively on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 8 of the Reclamation Act of 1902, 32 Stat. 390, as amended, 43 U.S.C. 383, provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

STATEMENT

The New Melones Project, an addition to the Central Valley Project in California,[2] was authorized by the Flood Control Acts of 1944 and 1962, 58 Stat. 887 and 76 Stat. 1180, 1191. The central feature of the project is the construction of a dam on the Stanislaus River for the purposes of flood control, irrigation, and hydroelectric power. Both the 1962 Act (incor-

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[2] See *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 279-284, for a description of the Central Valley Project.

porating by reference H. Doc. No. 453, 87th Cong., 2d Sess. (1962) and the 1944 Act set out detailed requirements and specifications for the project.

The Department of the Interior, through its Bureau of Reclamation, applied to the California State Water Resources Control Board for a determination of the availability of unappropriated water and for State permits appropriating the water for this project (Pet. 4; App. A, *infra*, pp. 8a-9a). The State Board in 1973 rendered Decision 1422, which approved issuance of the permits but imposed on them 25 detailed conditions dealing with, among other things, the amount of appropriation, stream flow, preservation of flora and fauna, white water rafting, water quality, construction schedules and techniques, and methods of water diversion; the Board also required further study and the filing of additional reports, and reserved jurisdiction to impose further conditions (App. A, *infra*, pp. 14a-15a; App. B, *infra*).

The United States then brought this action seeking a declaratory judgment that the conditions imposed in the permits are void; that the United States may appropriate unappropriated water necessary for federal reclamation projects in California without applying to the State for a permit; and that if the United States applies for such a permit as a matter of comity, the State must grant the permit if sufficient unappropriated waters are available (App. A, *infra*, pp. 2a-3a). The district court issued a declaratory judgment that the United States may appropriate any unappropriated water necessary for a federal reclamation project in California but must first, as a matter of comity, apply to the State for a determination of the availability of sufficient unappropriated water, although the State may not impose any conditions in the permits issued as a result of these applications (App. A, *infra*, pp. 66a-67a). Accordingly, the court declared the conditions in the instant permits void (*ibid.*). The court of appeals affirmed, although it held that Section 8 itself, not comity, required the United States to comply with the forms of state law, such as application for a permit (Pet. App. 1-11). On petition for rehearing the court rejected the contention that the conditions in these permits were valid because a state agency had filed some of the permit applications and assigned them to the Bureau of Reclamation (Pet. App. 12-16).

ARGUMENT

1. Section 8 of the Reclamation Act of 1902 directs that the Secretary of the Interior, in carrying out the provisions of the Act, "shall proceed in conformity with" State law. The issue in this case is whether that directive authorizes a state, in issuing permits to the United States to acquire water rights necessary for the operation of a federal reclamation project, to impose on those permits conditions that would give the State virtual control of the operation of the project.

Petitioners deny (Pet. 10 n. 7) that the State of California seeks "to control the use and allocation" of the water in the New Melones Project, although they concede that the State seeks "the power to par-

ticipate in determining" that use and allocation (Pet. 9). Petitioners emphasize (Pet. 5) that the State's administrative decision did not deny the right of the United States to the water required for the project, but merely deferred that right until the Bureau submitted a plan for the use of the water; and they claim (Pet. 7) that the conditions imposed by the State board "do not impair the purposes of the New Melones project."

Petitioners contend that this Court has interpreted Section 8 as authorizing state regulation of both the impoundment and release of water (Pet. 20), and has limited state authority only where there are specific and mandatory provisions in the federal reclamation laws (Pet. 21). They contend (Pet. 21 and n. 13) that this case is governed by general preemption principles which, they urge, require that a state law be upheld unless it conflicts with a specific federal law.

Petitioners' argument ignores the fundamental principle recognized by both courts below. As this Court stated in *Environmental Protection Agency* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 212 (quoted by the court of appeals, Pet. App. 4), "[f]ederal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous." In *Hancock* v. *Train*, 426 U.S. 167, the Court held:

> Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when

> and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous." [*Id.* at 179; footnotes omitted.]

Contrary to petitioners' contentions, this Court has consistently rejected the claim that Section 8 provides such a specific Congressional mandate permitting the states a degree of control over the operation of federal reclamation projects. In *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 291-292, the Court declared:

> As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska* v. *Wyoming*, *supra* [325 U.S. 589], at 615: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." * * * We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.

In *Arizona* v. *California*, 373 U.S. 546, 586-587, the Court quoted that holding from *Ivanhoe* and reaffirmed it, stating:

> Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with *Ivan-*

hoe, hold that the Secretary must be bound by state law in disposing of water under the Project Act.

Some examples of the 25 conditions imposed on the permits issued for the New Melones Project are sufficient to demonstrate that despite the holdings of *Arizona* v. *California* and *Ivanhoe*, the State of Califorfornia has attempted to assert control over the operation of the New Melones Project by means of its permit system.[3] Among the conditions that directly limit or control the use of project water are the limitations of consumptive use to four named counties (condition 4), the requirement that releases of water from the reservoir be scheduled so as to maintain a specific mean monthly total dissolved solids concentration (condition 5), the prohibition of off-season water collection and storage for the purpose of offsetting evaporation or seepage or for any other purpose (condition 14), and the prohibition of the use of any water outside the counties of origin if it is necessary "for the development" of those counties (condition 25). Other conditions limit the amount of water that may be impounded for fish and wildlife preservation and prohibit additional impoundment for power or recreation (condition 2), require the installation of an out-

[3] The types of restrictions imposed are summarized briefly in the opinion of the district court (App. A, *infra*, pp. 14a-15a). The order portion of the State Board's Decision 1422, which contains the 25 numbered conditions, is reproduced as Appendix B to this brief. A copy of the entire Decision 1422 is being lodged with the Clerk of the Court.

let pipe in the dam at the bottom of the natural stream channel (condition 17), and require the site of the reservoir to be cleared of all structures, trees and other vegetation interfering with storage or recreation (condition 18). Many of the other conditions require the submission of various reports and studies (conditions 3, 7, 8, 12, 21) and reserve jurisdiction to impose further conditions (conditions 6, 9, 13, 20, 22).

Indeed, although the district court correctly deemed it unnecessary to make a finding on this issue (App. A, *infra*, p. 63a), a comparison indicates that certain of the conditions imposed in Decision 1422 conflict specifically with the congressionally approved plans and objectives for the New Melones Project.[4]

[4] The project report from the Army Chief of Engineers (H.R. Doc. No. 453 (New Melones Project), 87th Cong., 2d Sess. 1-2, 13 (1962)), which Congress approved as the standard for the project, 76 Stat. 1191, specifies that the project reservoir is to have a capacity of 2,400,000 acre-feet and a power capacity of 150,000 kilowatts. The permit, however, prohibits use of the full storage capacity: it allows impoundment of only 98,000 acre-feet per year, plus the amount necessary to maintain certain water quality standards, to satisfy prior rights, and for flood control, and it prohibits any additional impoundment for the purpose of producing power (condition 2). Further, although irrigation was a major purpose of the project (see, *e.g.*, H.R. Doc. No. 453, *supra*, at 57), the permit does not authorize any impoundment for that purpose (see condition 2).

Also, Congress provided that the New Melones Project was to "become an integral part of the Central Valley Project," 76 Stat. 1191-1192, but the State Board effectively prohibited integration with the Central Valley Project by limiting the consumptive use of project water to four counties

2. Petitioners also contend (Pet. 21-25) that because the United States, with respect to certain of the permits in question, was the assignee of permit applications originally filed by state agencies, the United States stands on no better footing than its assignor and is subject to the conditions imposed by the State Board. The court of appeals correctly rejected this contention (Pet. App. 12-16). It concluded that under California law the state agencies acquired—and later assigned to the United States—not a permit subject to certain conditions,[5] but only a priority right over later applicants.[6] When the application was assigned it was not subject to the conditions at issue here, which were imposed later by the State Board.

(condition 4). Indeed, the Board provided that any petition to amend the permits to authorize use of New Melones water outside these four counties must contain "a showing that water from other CVP [Central Valley Project] sources is not available to serve such areas" (condition 4).

[5] Although the court of appeals noted that "[t]here is no contention that the assignment was expressly conditioned upon acceptance of any permit conditions the State might impose" (Pet. App. 14), petitioners now suggest (Pet. 25 n. 15) that certain exhibits show that the United States did agree to accept permit conditions. The State Board did not purport to justify the conditions imposed by reference to any consent on the part of the United States, nor was this issue raised before the district court.

[6] Judge Wallace concurred (Pet. App. 15-16) in this portion of the court's opinion without reaching the additional ground relied on by the majority, which was that even if the United States had been the assignee of conditional rights, the conditions would be invalid if contrary to federal law (App. A, *infra*, p. 13a).

3. The other questions discussed by petitioners are not at issue before this Court. Although petitioners contend (Pet. 6 and n. 4, 12, 18-19) that this case raises the issue of the United States' implied reservation of water, the United States has not claimed any reserved rights in connection with the New Melones Project.

Nor is it necessary for this Court to consider (see Pet. 2) whether the court of appeals erred in holding that the United States is required by Section 8 to comply with the forms of state law by filing a permit application, even though Section 8 does not empower the state to withhold a permit for a reclamation project if unappropriated water is available, nor to condition a federal permit in ways governing the operation of the project. In this case the United States did, as a matter of comity, follow the formal requirements of state law and obtain the permits at issue here. Contrary to petitioners' allegations that the United States is reversing several decades of settled administrative practice (Pet. 8-9, 14-15), the district court, after considering the evidentiary materials petitioners submitted, found (App. A, *infra*, pp. 50a-57a) that the United States' action in this case was in accord with the Bureau's consistent administrative interpretation and practice. Although the United States sought a declaratory judgment affirming its view that while it might continue to obtain state permits as a matter of comity, it was not required to do so by Section 8, the United States does not here challenge—since it has no

effect in this case—that portion of the majority's opinion [7] which expresses the view that Section 8 itself requires compliance with the forms of state law.

The only question raised by this case is whether the court of appeals erred in holding the 25 permit conditions in Decision 1422 invalid on the ground that Section 8 does not authorize state control of federal reclamation projects. We submit that the court did not err.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1977.

[7] Judge Wallace dissented on this point (Pet. App. 10).

APPENDIX A

UNITED STATES DISTRICT COURT
E. D. CALIFORNIA

Civ. No. S-3014

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF CALIFORNIA ET AL., DEFENDANTS.

Oct. 9, 1975

John H. Germeraad, Douglas N. King, U.S. Dept. of Justice, Washington, D. C., Richard Nichols, Asst. U.S. Atty., Sacramento, Cal., for plaintiff.

Evelle J. Younger, State Atty. Gen., and Richard C. Jacobs, Roderick E. Walston, San Francisco, Cal., for defendants.

OPINION

MacBRIDE, Chief Judge.

At the turn of the century, a burgeoning nation was in the midst of Western expansion. Hampering this expansion, however, was the simple geographical fact that great areas within the Western states and territories encompassed arid and semiarid lands. By the enactment of the Reclamation Act of 1902, Title 43 U.S.C. § 371 *et seq.*, Congress concluded that much of these arid and semiarid lands could be made habitable and fruitful by the construction of federally-funded irrigation works.

Now, 73 years, dozens of projects, and billions of dollars later, this court is asked to enter "the delicate area of federal-state relations in the irrigation field," [1] and resolve the question whether a state may impose terms and conditions on the federal government's acquisition of water for reclamation projects.

The United States initiated suit in this court on October 15, 1973, against the State of California, the State Water Resources Control Board, and its members. Jurisdiction was grounded under Title 28 U.S.C. § 1345, conferring original jurisdiction to the district courts over all civil actions, suits or proceedings commenced by the United States. The amended complaint of the United States seeks declaratory relief pursuant to Title 28 U.S.C. § 2201 as follows:

(1) Declaratory judgment that the United States can appropriate unappropriated water necessary for use in any federal reclamation project within the State of California, without the necessity of applying to the California State Water Resources Control Board;

(2) Declaratory judgment that when the United States chooses as a matter of comity to submit applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available;

(3) Declaratory judgment that when the United States chooses as a matter of comity to submit appli-

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[1] *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958).

cations to the California State Water Resources Control Board, that Board cannot impose any terms or conditions in permits issued pursuant to such applications in contravention of federal law or which are not specifically authorized and required by federal laws, federal regulations, or federal administrative directives;

(4) Declaratory judgment that Decision 1422,[2] an April 4, 1973, decision of the California State Water Resources Control Board, is void in all respects where that decision conflicts with or contravenes federal law or requires action not specifically authorized and required by federal laws, federal regulations, or federal administrative directives.

By its answer, California [3] raises the following legal issues in response:

(1) The United States is required to comply with all terms and conditions imposed by California on permits issued to the United States Bureau of Reclamation to appropriate water for reclamation purposes in California, pursuant to Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, 32 Stat. 390; [4]

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[2] The conditions and terms imposed by Decision 1422 are specified hereafter in this opinion.

[3] For the purposes of brevity and clarity, all defendants in this action shall be referred to as "California."

[4] A detailed discussion of Section 8 of the Reclamation Act of 1902 will be made later in this opinion. Section 8 reads as follows:

> "Nothing in [this act] shall be construed as affecting or intended to affect or to in any way interfere with the laws

(2) The United States is required to comply with all terms and conditions imposed by California on permits issued to the United States Bureau of Reclamation to appropriate water for reclamation purposes in California, pursuant to recent environmental legislation passed by Congress, including the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, 83 Stat. 852, and the National Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371, 84 Stat. 114;

(3) The United States, by accepting assignments for permit applications and by submitting its own permit applications, has agreed to comply with California law in appropriating water for reclamation purposes in California;

(4) The United States has accepted the benefits of the permits issued by California since 1938, and is thus estopped to deny the truthfulness of the statement that it must comply with all terms and conditions imposed by California's permits;

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of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

(5) The United States failed to file mandamus action or to seek judicial review in California of Decision 1422 in accordance with California law, and thus the doctrine of *res judicata* bars the United States from alleging the invalidity of Decision 1422.

On September 3, 1974, California moved for summary judgment pursuant to FRCP 56 and for judgment on the pleadings in accordance with FRCP 12 (c). By these motions, California contends that there is no genuine dispute of any material fact and that the case is purely one of interpretation of federal and California law. The case is here now for disposition on these motions.[5] To fully understand the posture of this case and the nature of the questions presented herein, it is necessary to review its immediate history.

HISTORY OF THE CASE

Following the enactment of the Reclamation Act of 1902, Congress from time to time has authorized specific reclamation projects by way of special reclamation acts. One such special project which was

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[5] By order of this court dated July 8, 1974, all action, except for discovery, in four companion cases was stayed pending a decision in the instant case. The stayed cases include: *Central Valley Eastside Project Association* v. *State Water Resources Control Board* (Civ S-2582); *Kern County Water Agency* v. *State Water Resources Control Board* (Civ S-2583); *San Joaquin County Flood Control and Water Conservation District* v. *State Water Resources Control Board* (Civ S-2730); and *State of California* v. *Morton* (Civ S-2924). All parties in these actions were given leave to file briefs in the instant case as *amici curiae*.

eventually authorized by Congress was the Central Valley Project [hereafter CVP] which envisioned the coordinated development of the Sacramento and San Joaquin Rivers and their tributaries through a system of physical works to regulate and distribute water needed for agricultural, industrial, and municipal uses in the Central Valley of California. The CVP was authorized by the State of California through the Central Valley Project Act of 1933, Cal.Stats. Ch. 1042. California thereafter sought and secured federal assistance through the Rivers and Harbors Act of August 30, 1935, P.L. 74-409, 49 Stat. 1028, 1038; the Act of June 22, 1936, P.L. 74-739, 49 Stat. 1597; and the Rivers and Harbors Act of August 26, 1937, P.L. 75-392, 50 Stat. 844, 850. The Act of October 17, 1940, 54 Stat. 1198 provided in pertinent part as follows:

> ". . . that the entire Central Valley Project, California, . . ., is hereby authorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a

> means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes. . . ."

Construction of CVP was begun in 1937 and the initial units of CVP were placed into full coordinated operation in 1951. Speaking of the scope of the project, the Supreme Court of the United States noted in the case of *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958):

> "Central Valley is the largest single undertaking yet embarked upon under the federal reclamation program. It was born in the minds of far-seeing Californians in their endeavor to bring to that State's parched acres a water supply sufficiently permanent to transform them into veritable gardens for the benefit of mankind. Failing in its efforts to finance such a large undertaking, California almost a quarter of a century ago petitioned the United States to join in the enterprise. The Congress approved and adopted the project, pursuant to repeated requests of the State, and thus far has expended nearly a half billion dollars." 357 U.S. at 280, 78 S.Ct. at 1178.

Over the years, water uses increased in the Central Valley and Congress continued to authorize additional units and funds for CVP. One such unit, and the subject matter of the instant case, was the New Melones Project. The New Melones Project was originally authorized by the Flood Control Act of December 22, 1944, P.L. 78-534, 58 Stat. 887, and reau-

thorized by the Flood Control Act of October 23, 1962, P.L. 87-874, 76 Stat. 1180, 1191. The Flood Control Act of 1962 reads in part as follows:

> ". . . That upon completion of construction of the dam and powerplant by the Corps of Engineers, the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws. . . ."

The New Melones Project provides for a dam on the Stanislaus River, approximately 35 miles northeast of Modesto, California, to create a reservoir with a gross storage capacity of about 2,400,000 acre-feet,[6] for flood control, irrigation, municipal, industrial, domestic, power, recreation, water quality control, and fish and wildlife purposes. The New Melones Project provides also for the construction of a 300,000 kilowatt capacity hydro-electric powerplant immediately below the dam.

The United States, through the Bureau of Reclamation, Department of the Interior [hereafter the Bureau], had regularly applied to the California State Water Resources Control Board [hereafter the Board], and its predecessor, in accordance with California law, for permits authorizing appropriations of water. Similarly, the United States, through the Bureau, sought to obtain permits to appropriate unappropriated water from the Stanislaus River for development of the New Melones Project. To this end the Bureau filed with the Board applications Nos. 19303 and 19304, and sought assignments of applications Nos. 14858 and 14859.[7] The Board on April 4, 1973, rendered Decision 1422 which ruled on these applications. Although Decision 1422 granted the assignments and allowed permits to be issued for all the applications, it placed various terms and conditions on the permits. While California asserts that it has the authority to place terms and conditions on permits authorizing appropriations of water for reclamation projects, the United States counters that any imposition of terms and conditions by the state is impermissible.

[6] It is estimated that this storage capacity would create a lake stretching approximately 13 miles behind the dam.

DECISION 1422

As noted above, the Bureau applied to the Board for permits in the New Melones Project in accordance with four separate applications:

(1) Application 14858 was for a permit to appropriate 8,800 cubic feet per second [cfs] of water by direct diversion year round, and 980,000 acre feet per annum [afa] by storage to be collected from October 1 of each year to July 1 of the succeeding year for irrigation, domestic, municipal, industrial, fish culture, recreation, and water quality purposes from the Stanislaus River in Calaveras and Tuolumne Counties.

[7] Applications Nos. 14858 and 14859 were originally filed in 1952 by the California Department of Finance. The Bureau sought assignment of these applications rather than file new ones so as to obtain a priority date of appropriation in accordance to California law.

(2) Application 14859 was identical to Application 14858 except its purpose was to use the water for power generation purposes.

(3) Application 19303 was for a permit to appropriate 6,000 cfs by direct diversion and 2,400,000 afa by storage, both year round, for power generation from Stanislaus River in Calaveras and Tuolumne Counties.

(4) Application 19304 was for a permit to appropriate 2,250 cfs by direct diversion, and 2,400,000 afa by storage both year round, for irrigation, domestic, municipal, industrial, fish culture, recreation, and water quality control purposes from the Stanislaus River in Calaveras and Tuolumne Counties.

The primary point of diversion under all four applications is the proposed New Melones dam on the Stanislaus River, but there is also included a Knights Ferry division dam downstream from the New Melones dam.[8]

Numerous protests were filed in opposition to these applications by various individuals, companies, public agencies such as the Department of Fish and Game, and private associations such as the Environmental Defense Fund and the Sierra Club. These protests were concerned primarily with environmental matters or purported problems of diversion as related to prior users.

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[8] The Knights Ferry dam is listed as a point of direct diversion under applications Nos. 14858 and 19304.

California law requires the Board to evaluate the specific intended use of each proposed project and find that it is reasonable, beneficial, and in the public interest. The Board undertakes a balancing of competing demands and policy considerations and has broad discretion. Cal.Water Code § 1240; *Temescal Water Co.* v. *Department of Public Works*, 44 Cal.2d 90, 280 P.2d 1 (1955). As a preliminary matter, it should be noted that the Board concluded that sufficient unappropriated water was available to supply the Bureau's requests, other factors being equal.[9] Beyond this determination, the Board in Decision 1422 expressed several concerns:

(1) Perhaps of primary concern to the Board was the belief that the limited unappropriated resources of California should not be committed to an applicant in the absence of a showing of actual need for the water presently and within a reasonable time in the future. The Board noted:

> "The lack of evidence that the New Melones Project water will be needed for consumptive use outside the four basic counties [Tuolumne, Calaveras, San Joaquin, Stanislaus] for many years to come, if ever, or that it will be used within those counties at any definite time in the future, raises substantial doubt whether permits should be issued to impound more water in the New Melones Reservoir, at least at this time, than is need for satisfaction of prior rights and needed non-consumptive purposes—protection and

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[9] Decision 1422 at page 26.

enhancement of fish and wildlife, water quality, recreation, and the generation of power." Decision 1422 at page 17.

The Board noted that the Bureau had presented no specific plan for applying project water for consumptive purposes at any particular location. Further, the Board noted that CVP has substantial quantities of water that are not being used and are not under contract.

(2) The Board was further concerned that the reservoir which would be created by the New Melones dam would eliminate the use of the Stanislaus River for whitewater recreation and for stream fishing. The Board recognized that the reservoir would serve as a man-made lake for purposes of recreation and fishing, but did not consider this an equivalent substitute for the river's natural sources of recreation and fishing. The Board concluded:

> "In view of the preponderance of the adverse consequences of maintaining a reservoir of the size proposed by the Bureau, the public interest requires that any permits issued pursuant to Applications 14858 and 19304 prohibit the impoundment of water in New Melones reservoir for consumptive purposes until further order of the Board following a showing that the benefit that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the *permittee* has firm commitments to deliver water for such purposes." Decision 1422 at page 18.

(3) Another concern of the Board was the effect on the Stanislaus River salmon fishing resource—estimated to be worth $300,000 per year—by the granting of applications Nos. 14858 and 19304. Further study of this factor was felt to be necessary.

(4) The final major issue concerning the Board dealt with the question of granting the applications for the purpose of water storage. The question the Board posed to itself was whether the need for maintaining the river at its present regimen outweighed the need for additional power. Although the Board found that the annual benefits of the power function would be $5.5 million, it felt that the use of the river for recreation and environmental factors—especially whitewater uses and stream fishing—outweighed.

In summary, the Board concluded:

> "There is unappropriated water available to satisfy the demands of the project as proposed. However, the Bureau has no definite plan as to when or at what specific locations project water will be used for consumptive purposes outside the four basin counties, and it has sufficient surplus water from other sources to meet future increased demands outside these counties for a long period of years. Permits should not be issued for use of water outside these counties at this time.
>
> The public interest requires that the use of the Stanislaus River for whitewater boating, stream fishing and wildlife habitat be protected to the extent that water is not needed for other beneficial uses. Therefore, although there is a demon-

strated need for the full yield of the project for the four basin counties at some time in the future, but for which no contracts have been negotiated, and in view of the adverse effect the proposed reservoir will have upon these recreational uses, impoundment of water to satisfy that need should not be permitted at this time. Instead, the Board should retain jurisdiction over the permits for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when the need for the water is substantial." Decision 1422 at pages 26-27.

The Board thereupon approved assignment of applications Nos. 14858 and 14859 to the Bureau, and approved these applications and applications Nos. 19303 and 19304, in part. Permits were issued subject to 25 separate terms and conditions. It would serve no useful purpose at this stage to delve extensively into the particulars and requirements of these 25 terms and conditions. However, a summary of these terms and conditions will be helpful to an understanding of the posture of this case:

(1) Conditions relating to impoundment—Conditions 1 and 2 defer full impoundment of all the waters sought by the Bureau until such time as the Bureau is able to demonstrate a plan or a firm commitment for the use of project water.

(2) Conditions relating to reservation of jurisdiction—Conditions 6, 9, 13, 20, and 22 reserve jurisdiction to the Board to impose further conditions on the

Bureau to protect the "beneficial use" of water involved.

(3) Conditions relating to reporting requirements—Conditions 3, 7, 8, 12, and 21 impose requirements of further or continuing study or the filing of specified reports.

(4) Conditions limiting or controlling the use of water—Conditions 4, 5, 14, 19, 23, 24, and 25 place various limits or controls on the use of water to or from the project.

(5) Conditions relating to time—Conditions 10 and 11 impose various time constraints on completion of the project and application of water.

(6) Conditions relating to accessability—Conditions 15 and 16 discuss the access to be afforded to representatives of the Board and members of the public.

(7) Conditions imposing mandatory requirements—Condition 17 imposes the requirement on the Bureau to install an outlet pipe "as near as practicable to the bottom of the natural stream channel"; condition 18 requires the Bureau to clear vegetation and structures from the side of the reservoir in accordance with California Water Code provisions.

QUESTIONS PRESENTED

Although the United States initiated this action in quest of declaratory relief, the legal issues presently before the court are framed by California's motions for summary judgment and judgment on the plead-

ings. To facilitate analysis, it is possible to consolidate under three general categories, the questions presented by California's motions:

(1) *Interpretation of federal law*—Does Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, require federal agencies, in appropriating water for reclamation purposes, to comply with state law? In this regard, California has asked the court to consider (a) the plain language and the Congressional history of the Reclamation Act of 1902; (b) the cases which have considered the Act;[10] (c) the analogies which might be drawn from other Acts of Congress enacted subsequent to the Reclamation Act of 1902;[11] (d) and the administrative practice of the Bureau of Reclamation.

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[10] The cases on which the parties primarily rely include: *Nebraska* v. *Wyoming*, 295 U.S. 40, 55 S.Ct. 568, 79 L.Ed. 1289 (1935); *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356 (1935); *Nebraska* v. *Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 466, 78 S.Ct. 1174, 2 L.Ed. 2d 1313 (1958); *Fresno* v. *California*, 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28 (1963); *Arizona* v. *California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963); *Ivanhoe Irrigation District* v. *All Parties*, 53 Cal.2d 692, 3 Cal.Rptr. 317, 350 P.2d 69 (1960).

[11] Specific acts relied upon include the Federal Water Supply Act of 1958, 43 U.S.C. § 390b; the Auburn-Folsom South Project Act, 43 U.S.C. §§ 616aaa-616fff (1965); the National Environmental Policy Act of 1969, 42 U.S.C. § 4321; and the National Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371. In oral argument, California abandoned any reliance on the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1972).

(2) *Contentions in the nature of estoppel*—(a) Should the United States be equitably estopped to deny the validity of the Board's jurisdiction and of Decision 1422 because the United States initiated proceedings before the Board? (b) What is the *res judicata* and collateral estoppel effect of Decision 1422 as to the United States arising from the failure of the United States to appeal that decision pursuant to California law? (c) Should the court find that as a matter of law Decision 1422 does not materially alter or conflict with the purposes of the New Melones Project? (d) Would the failure to enforce Decision 1422 be contrary to the public policy of the people of California?

(3) *Procedural considerations*—Are the questions presented by this case appropriately determined and resolved by summary procedure?

INTERPRETATION OF FEDERAL LAW

Both the United States and California have admitted to this court in oral argument that pursuant to the Supremacy Clause of the United States Constitution, U.S.Const. Art. VI cl. 2, and because of national implications inherent in reclamation of arid and semiarid lands, the Congress *could* afford all power and control over federal reclamation projects to the federal government, reserving no power or control for the states. See *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 294, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958). The United States has ar-

gued that Congress did just that when it enacted the Reclamation Act of 1902. By its reading of that Act, the United States contends that: (1) because all power and control over reclamation projects has been given to the federal government, it need not even apply to the states for permits to appropriate water for such projects, and (2) even if the federal government, because of comity, does apply to the states for permits to appropriate water, the states' sole function is to determine whether there exists sufficient unappropriated water for the project. California, on the other hand, has argued that the Congress, by way of the Reclamation Act of 1902 and other federal legislation, intended that the federal government should physically operate reclamation projects, but that the federal government must comply with state law in the appropriation of water for projects.[12] Thus, the essential dispute between the litigants here is not whether the Congress *could* preempt the field, but whether the Congress *has chosen* to do so.

(1) The Reclamation Act of 1902.

At the very heart of this inquiry is the Reclamation Act of 1902 [hereafter the 1902 Act]. In 1902

[12] Before in its briefing and in oral argument before this court, California has conceded that even under its view of the law, there would be two major limitations on the rights of states to impose terms and conditions on federal reclamation projects. These two limitations are: (1) the state cannot infringe on any specific grant of power to the federal government under federal law, and (2) the state can only control *un*appropriated water.

the Western states and territories contained nearly one billion acres of land and comprised somewhat more than half of the United States' contiguous area. Great segments of this Western land, however, lay dry and fallow, either unnourished or undernourished by the nation's waterways. Over one-third of North and South Dakota were within the arid and semiarid belts. The portions of the States of Oregon and Washington lying west of the Cascade Mountain Range were within the humid climate, while portions lying east of the range, comprising approximately one-half of the territory of the two states, were arid or semiarid. In California arid and semiarid conditions existed over two-thirds of the state. Nearly one-third of Oklahoma was semiarid in character. Although neither Kansas nor Nebraska contained lands which were strictly speaking arid, nearly one-third of the western portion of each state was considered semiarid. The other states and territories of the West were wholly within the arid region, with the exception of limited areas affected by local conditions.[13]

As the United States grew in population, demand for productive land grew proportionately. It was estimated that through proper irrigation, between 35,000,000 and 70,000,000 acres of land in the West

[13] Report of the House Committee on Irrigation of Arid Lands, 57th Cong. 1st Sess. p. 1 (1902). Other states and territories included: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

could be reclaimed.[14] In 1900 the national platforms of the major political parties declared in favor of the undertaking by the federal government of the work of reclaiming arid and semiarid lands and holding such lands for settlers.[15]

President Theodore Roosevelt also favored development of the Western states and territories through irrigation and vigorously urged the enactment of legislation to this end: [16]

> "It is as right for the National Government to make the streams and rivers of the arid region useful by engineering works for water storage as to make useful the rivers and harbors of the humid region by engineering works of another kind. The storing of the floods in reservoirs at the headwaters of our rivers is but an enlargement of our present policy of river control, under which levees are built on the lower reaches of the same streams.
>
> The reclamation and settlement of the arid lands will enrich every portion of our country, just as the settlement of the Ohio and Mississippi valleys brought prosperity to the Atlantic States. The increased demand for manufactured articles will stimulate industrial production while wider home markets and the trade of Asia will consume the larger food supplies and effectually prevent Western competition with Eastern agriculture. Indeed

[14] Report of the House Committee on Irrigation of Arid Lands, 57th Cong. 1st Sess. p. 2 (1902).

[15] *Id.* at pp. 4-5.

[16] *Id.* at p. 5.

> the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries which would otherwise not come into existence at all. Our people as a whole will profit, for successful home making is but another name for the upbuilding of the nation."

Before enacting the 1902 Act, Congress carefully considered the alternatives that either private enterprise or the states themselves develop reclamation projects, rather than the federal government. It was recognized that private enterprise had constructed various irrigation projects in the past, but it was also recognized that such private projects were of a relatively simple character, intended to supply only single farms or limited areas of country.[17] As to the various states, the Congress considered lack of adequate funds for such extensive projects to be the most serious impediment.[18] Congressman Mondell, the leading advocate in the House for passage of the 1902 Act, suggested other reasons why the federal government, rather than the states, construct the reclamation projects: [19]

> "It has been suggested that if private enterprise can not properly develop large irrigation systems the work might be undertaken by the respective States. There are many reasons why the States are not so well equipped to carry on this work as

[17] *Id.* at pp. 2-3. House Debate on the Reclamation Act of 1902, 35 Cong.Rec. 6669 at 6675 (1902).

[18] House Committee at pp. 3-4.

[19] House Debate at p. 6676.

the Federal Government. In the first place, were —the work carried on by the States, the disposition would be to utilize all of the waters flowing through a State within the State, provided there was no prior appropriation lower down on the stream, regardless of the most beneficial and economical development of the irrigation possibilities of the entire region. Further, the constitutions of some of the States forbid the undertaking of works of internal improvement; and even were the States the proper agency through which to carry on this development, none of the States in the arid region, are financially able to do so."

Nevertheless, the Congress was mindful that the individual states had substantial and legitimate interests in the appropriation, use, and distribution of water used for irrigation. There were interests represented in the Congress which favored strong States' rights and advocated legislation whereby the federal government would simply build the reclamation project works and then turn over to the states control of the waters. On the other hand, there were advocates of reclamation legislation which would be more limiting on the States' authority, with power vested primarily in the federal government.

Section 8 of the 1902 Act as originally drafted and passed by the Senate was a strong States' rights provision: [20]

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation; *but State and Territorial laws shall govern and control in the appropriation, use and distribution of the waters rendered available by the works constructed under the provisions of this act*: Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." [emphasis added].

[20] S. 3057, 57th Cong., 1st Sess., § 8 (1902).

The above-quoted provision was then amended in the House Committee on Irrigation of Arid Lands. It is the House amendment which was enacted into law and that amendment reads as follows: [21]

> "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, *or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to or from any interstate stream or the waters thereof*: Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and the beneficial use sh .ll be the

[21] House Committee at p. 20.

basis, the measure, and the limit of the right." [emphasis added].

The change the House Committee made in the legislation apparently resulted from intervention by President Roosevelt, as noted by Representative Robinson of Indiana: [22]

> "At the beginning of this session the arid-State members in committee assembled properly elected the gentleman from Nevada chairman and proceeded to draft an irrigation bill. The committee was composed of a large majority of Republicans, but politics was submerged to get some irrigation legislation. The committee, of course, was confronted with platforms and constitutions, national and State. Where they pointed their way, they adopted them; where they ran counter, they ran over them or passed them by.
>
> They took up first the Republican national platform of 1900, and upon that this bill was drafted and introduced in the Senate. After a little while the bill passed without a division in the Senate, and went to the House Committee on Arid Lands, a majority of whose members are from arid or semi-arid States.
>
> The troubles then began. The President was for one kind of irrigation, with national control of canals and water distribution, and the Republican platforms, national, State, and Territorial, and some State constitutions of States affected, were for another kind, with State control of canals and water distribution. The President told

[22] House Debate at p. 6670.

> the committee that called on him that the Senate bill was not in consonance with his ideas of irrigation; that if the United States built canals it should, to keep the water supply from politicians, control the distribution."

This presidential intervention and its purpose was confirmed by President Roosevelt in his autobiography: [23]

> "On the day the message was read, a committee of Western Senators and Congressmen was organized to prepare a Reclamation Bill in accordance with the recommendations. By far the most effective of the Senators in drafting and pushing the bill, which became known by his name, was Newlands. The draft of the bill was worked over by me and others at several conferences and revised in important particulars; my active interference was necessary to prevent it from being made unworkable by an undue insistence upon State Rights, in accordance with the efforts of Mr. Mondell and other Congressmen, who consistently fought for local and private interests as against the interests of the people as a whole."

Time and again during the Congressional debates, the supporters of the 1902 Act made clear the understanding that reclamation was a *national* project to be undertaken by the national government. To the suggestion that the federal government not itself re-

[23] Theodore Roosevelt: An Autobiography, at p. 396 (Scribner 1926).

claim the land in question but rather cede the land to the states, Congressman Reeder notes: [24]

> "We have been told that the Government, which is the owner of these lands, should not reclaim them itself, but should cede them to the States. It is sufficient answer to that to say that many State grants have been already made of different amounts of land and for different purposes, and the experience of the past has demonstrated beyond any question that the States cannot be safely intrusted with the reclamation and settlement of these lands. No matter what conditions might be imposed on such a grant, schemers and speculators would find some way of manipulating the State legislatures and getting control of the lands in large tracts which would retard settlement."

And again Congressman Newlands notes as follows: [25]

> "Nothing can be accomplished by conveying this land to the States. The State lines are arbitrary lines, not drawn with reference to the watersheds, but arbitrarily by the surveyors, straight north, south, east and west. Were these States so bounded that each could compose an entire watershed, with all of its tributaries, then it would be possible to cede all the public domain to the States with the expectation of some just and proper result, but a river, with all its tributaries, may reach into four or five States. Scientific reclamation requires conservation regardless of State lines."

[24] House Debate at p. 6740.

[25] *Id.* at p. 6734.

However, by the inclusion of Section 8, Congress recognized that notwithstanding the national scope of reclamation, state law had important, albeit limited, functions in the equation. Certainly, Section 8 on its face does not make crystal clear that role of state law, although it is apparent that state law *does* have a role in regard to federal reclamation projects. By a careful reading of the Congressional history, however, it is apparent that state law would have at least two functions under Section 8 of the 1902 Act.

As to the first function, Congressman Martin indicated that Section 8 would be used to modify and complement Section 7, which latter section dealt with the federal government's power of eminent domain: [26]

> "[Section 7] should be read in connection with section 8, which is in the nature of a limitation upon this section. Section 8 provides that the Secretary of the Interior, when proceeding under this act, must proceed in conformity with the State laws. It therefore makes, taking the two sections together, simply an instruction to the Secretary of the Interior to invoke the aid of the State laws upon the subject of eminent domain where necessary."

Indeed, it was settled by the Supreme Court in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 466, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958) and in

[26] *Id.* at p. 6759.

Fresno v. *California*, 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28 (1963), that Section 8 requires the federal government to look at state law to define the property interests for which compensation must be made pursuant to Section 7 eminent domain proceedings.

Secondly, Section 8 is a reaffirmation of the doctrine that the states are free to apply their own rules of water law and the federal government cannot enforce any particular rule upon any state. Section 8 was not written upon a clean slate, but rather, on the overlay of prior federal law. As examples of the federal legislation upon which Section 8 was based, Congressman Mondell cited the Act of July 26, 1866 (14 Stat. 253); the Act of July 9, 1870 (16 Stat. 218); and the Act of March 3, 1877 (19 Stat. 377).[27] In *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356 (1935), and cases cited therein, the Supreme Court noted as follows:[28]

> "For many years prior to the passage of the Act of July 26, 1866 [citations omitted], the right to the use of water for mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The first appropriator of water for a beneficial use was uniformly recognized as having

[27] *Id.* at p. 6679; other acts cited include the Act of March 3, 1891 (26 Stat. 1095) and the Act of June 4, 1897 (30 Stat. 1136) [sic].

[28] 295 U.S. at 154, 55 S.Ct. at 727.

> the better right to the extent of his actual use. The common law with respect to riparian rights was not considered applicable, or, if so, only to a limited degree. Water was carried by means of ditches and flumes great distances for consumption by those engaged in mining and agriculture. [citations omitted] The rule generally recognized throughout the states and territories of the arid region was the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well. [citations omitted].
>
> This general policy was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866. [citations omitted]"

The Supreme Court further explained that the Act of July 9, 1870, which amended the Act of 1866, was a reaffirmation of the doctrine that the states are free to apply their own rules of water law.[29] See also *Kansas* v. *Colorado*, 206 U.S. 46, 94, 27 S.Ct. 655, 51 L.Ed. 956 (1907).

Finally, the Supreme Court notes that the Desert Land Act of March 3, 1877, is fully consistent with this doctrine:[30]

[29] *Id.* at p. 155, 55 S.Ct. 725.

[30] *Id.* 295 U.S. at p. 164, 55 S.Ct. at 731.

> "The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what might be an impediment to its full and successful operation."

Similarly, Section 8 does not bind or purport to bind the states to any policy, but recognizes and gives sanction, as far as the United States and its grantees are concerned, to the state law doctrine of appropriative rights to water. In this regard, also, Section 8 guards prior rights granted by the individual states to individual water users.

As noted by Congressman Mondell in his committee's report to the House: [31]

> "The American irrigator, beginning with the handicap of a woeful lack of knowledge of the subject, and an inherited common-law rule fatal to its solution, has acquired a vast fund of theoretic knowledge and practical experience. He has been instrumental in the adoption of rules and regulations, and the establishment of customs, relative to the use of water in irrigation to the arid region which, in some States, are well-nigh perfect, and in all are a distinct advance over former conditions. The bill recognizes the control of these local laws in matters of recording appropriations of water and in establishing and maintaining rights of users. . . ."

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[31] House Committee at p. 8.

California, however, discerns another meaning within the words of Section 8. In short, California reads Section 8 as requiring the federal government to apply to affected states for permits to appropriate water for reclamation projects and to comply with terms and conditions which the affected states might impose (as long as not expressly prohibited by other federal law), before the federal government can acquire the water necessary to construct the project.

As an initial matter, it is at least arguable whether the United States, in acquiring water for the development of a reclamation project, should be considered an "appropriator" in the true legal sense of that term. Appropriation of a water right implies legal title thereto, and as the Supreme Court noted in *Ickes* v. *Fox*, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937): [32]

> "Although the [federal] government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act [of 1902], for the use of the landowners."

Perhaps for clarity, it would be better to consider the federal government's actions in obtaining water for the development of reclamation projects as the "acquisition" rather than the "appropriation" of water.

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[32] 300 U.S. at pp. 94-95, 57 S.Ct. at pp. 416-417.

However, even if the federal government is considered to be "appropriating" the water required to develop and operate the reclamation project, it is certainly not clear from the language of Section 8 nor from the Congressional history that the federal government must apply to states for permits to appropriate or that the federal government must comply with terms and conditions which states might impose on such permits.

If anything, the Congressional history of Section 8 indicates the opposite interpretation: that reclamation is an undertaking of national concern, transcending the often arbitrary geographic boundaries of individual states and territories. Even a leading States' rights advocate such as Senator Clark recognized the necessity of broad federal power in the development and construction of reclamation projects: [33]

> "The question of the conversation of waters is one of national importance; the question of reservoir sites and reservoir building is one that appeals to the [federal] Government as a matter of national import, but the question of State or Territorial control of waters after having been released from their bondage in the reservoirs which have been provided is a separate and distinct proposition . . . . It is right that the General Government should control, should conserve, and should reservoir the headwaters of these streams. In this it is a national and not a State proposition. But in the distribution of these waters . . . it is right and proper that the various

[33] Senate Debate on the Reclamation Act of 1902, 35 Cong. Rec. p. 2222.

> States and Territories should control in the distribution."

Of course, Senator Clark's suggestions as to the power of the *States* in controlling distribution were rejected by the House and ultimately, by Congress as a whole. Nevertheless, his comments are relevant and useful on the question of *federal* power regarding the development and construction of reclamation works.

The only comment within the Congressional history of the 1902 Act which might be supportive of California's position is a statement by Congressman Mondell in response to a question seeking clarification of the federal-state relationship envisioned by the 1902 Act. Congressman Mondell noted that it was necessary for the federal government, after determining the need and feasibility for a particular reclamation project, to refer to the affected state by "giving the notice and complying with the forms of law of the State . . . in which the works [are to be] located." [34]

On the one hand, this statement by Congressman Mondell supports California's position that the federal government must apply to affected states before acquiring the water necessary to construct a reclamation project. On the other hand, however, this statement might also be read, as the United States has done, to require compliance with the forms, but not necessarily with the substance of state law.

[34] House Debate at p. 6678.

Indeed, while the Congressional history of the 1902 Act indicates broad federal purpose and authority in the operation and control of federal reclamation projects, the comity inherent in a federal system would not permit an overbroad usurpation of state sovereignty. Accordingly, the federal government is required, when acquiring water for federal reclamation projects, to comply with the forms of state law, including application to state water boards where necessary, for two purposes: (1) to enable the state to determine, according to its law, whether there is sufficient unappropriated water available for the project; and (2) to give notice to the state of the scope of the project.

(2) Judicial Interpretation of the Reclamation Act of 1902.

Both the United States and California rely on several judicial decisions relating to the 1902 Act. It is necessary to review these cases to determine if they provide any insight on the question presented by the instant case.

(a) *Nebraska* v. *Wyoming*, 295 U.S. 40, 55 S.Ct. 568, 79 L.Ed. 1289 (1934) was a suit by Nebraska against the State of Wyoming for equitable apportionment of the waters of the North Platte River. The United States was not made a party to that suit and Wyoming, as part of its motion to dismiss, asserted that the United States was an indispensable

party. In deciding that the United States was not an indispensable party, the Supreme Court stated: [35]

> "The bill alleges, and we know as a matter of law [citing Section 8 of 1902 Act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the state of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party."

Additionally, there is dicta in this opinion which is certainly supportive of the position California advances to this court: the Supreme Court notes that the Secretary of the Interior had applied to the state engineer of Wyoming for permission to construct reservoirs and impound water "pursuant to the [1902] act," and also that the acts of the federal government in operating reservoirs are subject to the law of Wyoming.[36]

This dicta should not be afforded great weight, however, since the actions of the Supreme Court in 1935 should be considered procedural only. In 1938, the Supreme Court allowed the United States to intervene, over the objections of all the state parties,

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[35] 295 U.S. at 43, 55 S.Ct. at 569.

[36] 295 U.S. at 42, 55 S.Ct. 568.

and stated that its order "shall be without prejudice to the determination on final decree of any of the substantive questions of law or fact advanced or to be advanced by any of the parties herein." [37]

(b) *Nebraska* v. *Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945) was both a continuation and an extension of the 1935 case. At this time, however, the United States asserted that it owned all of the unappropriated water in the North Platte River at the time it acquired water rights for two federal reclamation projects, the North Platte Project and the Kendrick Project. The Supreme Court did not reach the question whether the United States did, in fact, own all the unappropriated water in the North Platte River because it determined that the United States' acquisition of water rights for the North Platte Project and the Kendrick Project "have been obtained in compliance with state law." [38]

In fact, the United States had made filings with the state: [39]

> "Initiation of both projects [North Platte Project and the Kendrick Project] was accompanied by filings made pursuant to § 8 [of the 1902 Act] in the name of the Secretary of the Interior for and on behalf of the United States. Those filings were accepted by the state officials as adequate under state law. They established the priority dates for

[37] *Nebraska* v. *Wyoming*, 304 U.S. 545, 546, 58 S.Ct. 1035, 82 L.Ed. 1519 (1938).

[38] 325 U.S. at 612, 65 S.Ct. at 1348.

[39] 325 U.S. at 613, 65 S.Ct. at 1348.

> the projects. There were also applications to the States for permits to construct canals and ditches. They described the land to be served. The orders granting the applications fixed the time for completion of the canal, for application of the water to the land, and for proof of appropriation. Individual water users contracted with the United States for the use of project water. These contracts were later assumed by the irrigation districts. Irrigation districts submitted proof of beneficial use to the state authorities on behalf of the project water users. The state authorities accepted the proof and issued decrees and certificates in favor of the individual water users. The certificates named as appropriators the individual landowners. They designated the number of acres included, the use for which the appropriation was made, the amount of the appropriation, and the priority date. The contracts between the United States and the irrigation districts provided that after the stored water was released from the reservoir it was under the control of the appropriate state officials."

Although the United States did submit the appropriate forms of law to the affected states and thereby gave notice of the construction of the reclamation projects, and also complied with the state law requirements in the construction of canals and ditches carrying water from the projects to users, the Supreme Court was careful to point out an important caveat: [40]

[40] 325 U.S. at 612, 65 S.Ct. at 1348.

> "Nor, as we shall see, it is important to the decree to be entered in this case that there may be unappropriated water to which the United States may in the future assert rights through the machinery of state law *or otherwise*." [emphasis added]

And again the Court noted as follows: [41]

> "We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made."

On the one hand, these quotations may only be a reference to the power of eminent domain which the United States might have exercised pursuant to Section 7 of the 1902 Act. Viewed broadly, however, the quotations indicate a recognition that in the particular case before the court the United States *had* followed state law, but that opinion is reserved whether, under the circumstances of that case, the United States was *required* to do so under the 1902 Act.

And finally, the Supreme Court noted the narrow issues decided by the case, and indicated that its

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[41] 325 U.S. at 615, 65 S.Ct. at 1349.

The following language from the *Nebraska* opinion is also noteworthy:

> "We do not suggest that where Congress has provided a system of regulation for Federal projects it must give way before an inconsistent state system." 325 U.S. at 615, 65 S.Ct. at 1349.

This admonition was later borne out in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958), discussed infra.

decision "in no wise interferes with the ownership and operation by the United States of its storage and power plants, works, and facilities." [42]

(c) *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958) is not particularly helpful to either the United States or California in the disposition of the instant case. In *Ivanhoe* the United States Supreme Court reversed several decisions of the California Supreme Court which had refused to confirm certain contracts entered into between two state irrigation districts and a water agency on the one hand, and the United States on the other. The California Supreme Court had held that the language of Section 8 requiring compliance with state law overrode the requirements of Section 5, which provides generally that no project water should be sold for use on land parcels exceeding 160 acres in size. The California court found that Section 5 of the federal law would be contrary to California law because it would result in discrimination against owners of parcels exceeding 160 acres. This decision led the court to refuse to confirm the aforementioned contracts. The United States Supreme Court in reversing the California Court, stated as follows: [43]

> "As we read § 8, it merely required the United States to comply with state law when, in the operation of a reclamation project, it becomes

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[42] 325 U.S. at 616, 65 S.Ct. at 1349.

[43] 357 U.S. at 292, 78 S.Ct. at 1183.

> necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State. . . ."

The California Supreme Court on remand in *Ivanhoe Irrigation District* v. *All Parties*, 53 Cal.2d 692, 3 Cal.Rptr. 317, 350 P.2d 69 (1960), recognized the scope of federal power in operating reclamation projects when it noted: "

> "[The United States Supreme Court] expressly held that the United States may acquire, by condemnation if necessary, whatever water rights it may need to operate the project, so that after such acquisition such rights are not subject to state control."

However, this court feels that the true impact of the United States Supreme Court's decision in *Ivanhoe* as it relates to this case is not so much what the court said, but rather, what the court did not say. While recognizing that Section 8 did not require the United States to violate Section 5 merely because state law was not consistent with the requirements of Section 5, the United States Supreme Court expressly noted that its decision should not be read as "passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field." [45]

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[44] 53 Cal.2d at 715, 3 Cal.Rptr. at 330, 350 P.2d at 82.

[45] 357 U.S. at 292, 78 S.Ct. at 1184.

(d) *City of Fresno* v. *California*, 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28 (1963) is not particularly relevant to the inquiry in this case, although it is cited by both parties herein. *Fresno* merely stands for the proposition that while Section 8 of the 1902 Act requires compliance with California law when defining the property interests, if any, for which compensation must be made pursuant to the Section 7 eminent domain power, Section 8 cannot operate to prevent the United States from exercising the power of eminent domain.

(e) *Arizona* v. *California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), while primarily concerned with the construction of Section 14 of the Boulder Canyon Project Act,[46] necessarily interpreted the applicability of Section 8 of the 1902 Act, since, under Section 14 of the Boulder Canyon Project Act, the reclamation law shall govern the management of the works, except as otherwise provided.

The Boulder Canyon Project Act established a reclamation project on the Colorado River. Notwithstanding the federal government's construction, ownership, operation, and maintenance of the Colorado River works and the broad power given by Congress to the Secretary of the Interior to make contracts for the distribution of water, it was argued that Sections 14 and 18 of the Boulder Canyon Project Act took away virtually all of the Secretary's power by permitting the States to determine with whom and

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[46] 45 Stat. 1057, 43 U.S.C. §§ 617-617t (1928).

on what terms the Secretary would make water contracts. The Supreme Court disagreed with this argument.

Section 18 of the Boulder Canyon Project Act states:

> "Nothing herein shall be construed as interfering with such rights as the States [now have] either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders."

The Supreme Court noted as follows: [47]

> "Section 14 provides that the reclamation law, to which the Act is made a supplement, shall govern the management of the works except as otherwise provided, and § 8 of the Reclamation Act [of 1902], much like § 18 of the Project Act, provides that it is not to be construed as affecting or interfering with state laws 'relating to the control, appropriation, use, or distribution of

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[47] 373 U.S. at 585-587, 83 S.Ct. at 1490-1491. The partial dissenting opinion of Mr. Justice Harlan is helpful in focusing on the narrowness of the Supreme Court's determination in *Ivanhoe*. Justice Harlan notes:

> "[*Ivanhoe*], despite its dictum that § 8 applies only to the acquisition of rights by the United States and not to the operation of a dam, holds only that the clear command of § 5 of the [1902 Act]—that water deliveries to each user not exceed the quantity required for 160 acres—prevails over state law, not that state law does not generally govern priorities in the use of water from federal reclamation projects under § 8." 373 U.S. at 623-624, 83 S.Ct. at 1510.

> water used in irrigation.' In our view, nothing in any of these provisions affects our decision, stated earlier, that it is the Act and the Secretary's contracts, not the law of prior appropriation, that control the apportionment of water among the States. Moreover . . . we hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections to follow state law. The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by his court in [*Ivanhoe* and *Fresno*] . . . . Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in [*Ivanhoe*], we cannot, consistently with *Ivanoe*, hold that the Secretary must be bound by state law in disposing of water under the Project Act."

California has argued, however, that the Boulder Canyon Project differs significantly from the New Melones Project in that the former is an interstate development, whereas the latter is "wholely intrastate." This contention ignores the fact that reclamation projects, as a whole, are of national importance, transcending state lines. And this is so even where the project works are located solely within the geographical confines of a single state. Crops raised by project water in California, for example, may feed families in Maine, or create processing jobs in Illinois. In *Arizona* it was clear that the federal government, as operator of the Boulder Canyon Project, could not be subject to the varying and possibly inconsistent

commands of different state legislatures in the disposal of water *from* the project. That holding, of course, does not directly answer the question posed by the instant case: whether the federal government must submit to state law in *acquiring* the water for the project.

In summary, it must be said that the cases cited and relied upon by both the United States and by California are more supportive of the position advanced by the United States, than of the position of California.

(3) Other federal legislation.

By analogy to acts of Congress passed into law subsequent to the 1902 Act, California contends that Congress has consistently intended to afford to the states the primary responsibility over "water distribution," and that the role of the federal government is to cooperate and participate with the states in reclamation projects. As an initial matter, it must be reiterated that the issue in this case does not revolve around "water distribution," but rather, "water acquisition." A thorough reading of the enactments cited by California does not, however, evince a Congressional abdication of the federal government's role in developing, operating, and controlling, federal reclamation projects.

(a) California contends that the policy declaration within the Federal Water Supply Act of 1958, 43 U.S.C. § 390b, is a reaffirmation of the primary re-

sponsibility of the states over "water distribution." That section reads as follows:

> "It is declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with State and local interests in developing such water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with State and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects."

Certainly, this section is a recognition of the individual states' primary obligations to develop water supplies for internal uses. On this basis the federal government is charged with participation and cooperation with the states in the development of such water supplies. It would be too broad a reading of this section to infer that the federal government is thereby subjected to individual state *control* in the development and operation of federal reclamation projects.[48]

(b) California also attempts to draw analogies to Section 5 of the Auburn-Folsom South Project Act, 43 U.S.C. § 616aaa—§ 616fff. This act generally pro-

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[48] It should be noted that the Federal Water Supply Act also specifically provides that the act "shall not be construed to modify the provisions of" Section 8 of the 1902 Act. 43 U.S.C. § 390b(c).

vides for the construction of the Auburn Dam on the American River and for distribution facilities in downstream areas. The Auburn-Folsom South Project Act imposes specific obligations on federal officials, similar to those imposed in the New Melones Acts,[49] including: provision for power generation, 43 U.S.C. § 616aaa; flood control, 43 U.S.C. § 616bbb; recreation, 43 U.S.C. § 616ccc; fish and wildlife enhancement, 43 U.S.C. § 616ccc; protection of the needs of counties and watersheds in which the water originates, 43 U.S.C. § 616eee. Additionally, the Auburn-Folsom South Project Act imposes a further obligation on the Secretary of the Interior to "give due consideration" to California's water plan and to "consult" with local interests affected by the project, 43 U.S.C. § 616ddd.

Specifically, Section 5 of the Auburn-Folsom South Project Act provides as follows:

> "Nothing contained in [this Act] shall be construed by implication or otherwise as an allocation of water, and in the studies for the purposes of developing plans for disposal of water as herein authorized, the Secretary shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs."

Section 5 of the Auburn-Folsom Project Act mandates that the Secretary of the Interior shall make recom-

[49] See discussion of New Melones Authorizing Acts, *infra*.

mendations for the use of water in accord with State law *in the studies for the purposes of developing plans for the disposal of water as authorized by the Act.* It does not confer project control on the State of California.[50]

(c) It is also pointed out by California that the National Environmental Quality Improvement Act of 1970 (NEQIA) provides that the "primary responsibility for implementing this policy [for protection and enhancement of the national environment] rests with State and local governments." 42 U.S.C. § 4371 (b)(2). California further indicates that the National Environmental Policy Act of 1969 (NEPA) states that federal agencies must cooperate with States and local governments in the achievement of environmental goals. 42 U.S.C. § 4331(a).

The Congressional intent underlying both NEQIA and NEPA was to raise awareness of environmental concerns and provide a mechanism for the input of such concerns in the decision-making process. The "mechanism" to be employed is the Environmental Impact Statement. At least in the case of the New Melones Dam project, the Ninth Circuit Court of Appeals has already tested the sufficiency of the Environmental Impact Statement and has determined that environmental concerns were adequately considered. *Environmental Defense Fund, Inc.* v. *Arm-*

[50] This reading is entirely consistent with the Congressional history of § 5 of the Auburn-Folsom South Project Act. See S.Rep.No. 1289, 88th Cong., 2d Sess., 3-4 (1964); H.R.Rep. No.1826, 88th Cong., 2d Sess., 10 (1964).

strong, 487 F.2d 814 (9th Cir. 1973), *cert. denied* 416 U.S. 974, 94 S. Ct. 2002, 40 L.Ed.2d 564 (1974). There is no indication that Congress intended either NEQIA or NEPA to either affirm or establish a policy of state control of the environmental aspects of federal reclamation projects.

(d) The Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887, and the Flood Control Act of 1962, P.L. 87-874, 76 Stat. 1180, 1191, authorize the New Melones Project. California cites sections of these authorizing acts in support of its contention that states may exercise control over the development and operation of federal reclamation projects. California relies particularly on three aspects of these acts:

[1] The 1944 Act declares as follows:

> "[I]t is hereby declared to be the policy of the Congress to recognize the interest and rights of the states in determining the development of the water sheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers." 58 Stat. 887-88 (1944).

[2] The 1962 Act imposes specific obligations on federal government officials in operating the project including: giving priority to water needs within the Stanislaus River Basin before water is exported for use outside the basin, providing for the preservation and propagation of fish and wildlife, providing for

the generation of electrical energy, and maintaining downstream water quality control. 76 Stat. 1191-92.

[3] The 1962 Act makes specific mention that states are not to control flood control aspects of the project, 76 Stat. 1191, and the 1944 Act specifically prevents state control with respect to water rights reserved for Indian reservations. 58 Stat. 891.

The authorizing act provisions cited by California, however, are entirely consistent with the concept of federal control of federal reclamation projects, coupled with federal-state development and coordination as to water uses. Coordination in the planning stage does not mean federal abdication of responsibility or control to state boards and agencies in the development and operation of federal reclamation projects. Further, the enumeration of specific federal obligations does not infer state control nor does the specific identification of exceptions to state control imply that other elements of project operation are to be placed within state control.

In summary, therefore, although the acts cited by California indicate a strong Congressional intention to include the States and state law in the planning process and to ensure federal-state cooperation in projects, it cannot be said that these acts indicate by analogy or otherwise, a Congressional intention to abdicate the federal government's responsibility to develop and operate reclamation projects.

(4) Administrative Practice.

Although the Congressional history and judicial interpretation of Section 8 supports the legal posture

of the United States, the State of California has urged this court to nevertheless consider the administrative practice of the Bureau of Reclamation vis a vis the state board. Certainly, when construing the meaning of a statute, it is pertinent and appropriate for a court to look to the administrative practice and interpretation placed on the statute by those charged with its administration. *Zemel* v. *Rusk*, 381 U.S. 1, 85 S. Ct. 1271, 14 L.Ed.2d 179 (1965). This rule of statutory construction is grounded in the belief that by statutory clarification Congress would presumably have altered any administrative interpretation which conflicts with the statute's intent.

The administrative practice of the Bureau of Reclamation is of some relevance in the present case. Both the United States and California have asserted to this court that this is a case of first impression and of national importance. If indeed this is true, as appears to be the case, then the administrative practice of the Bureau regarding the acquisition of water for federal reclamation projects has been an extraordinarily happy and tranquil practice which has somehow avoided the courts for three-quarters of a century since the enactment of Section 8. Such long-standing harmony would indicate that Congress was apparently satisfied that both the Bureau and the state boards were exercising authority within the allowable scope of Section 8.

The exhibits and affidavits on the subject of administrative practice have been primarily submitted by California. The Secretary of the Interior, the

Commissioner of Reclamation, and the Regional Director of the Bureau of Reclamation have all been cited in these exhibits and affidavits. For example, California cites the 1944 statement submitted by the Regional Director of the Bureau, after consultation with the Secretary of the Interior and the Commissioner of Reclamation. This statement was quoted by the Supreme Court in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 740, 70 S. Ct. 955, 94 L.Ed. 1231 (1950). The statement reads in pertinent part as follows: [51]

> "The Bureau of Reclamation does recognize and respect existing water rights which have been initiated and perfected or which are in the state of being perfected under State laws. The Bureau of Reclamation has been required to do so by Section 8 of the Reclamation Act of 1902 ever since the inception of the reclamation program administered by the Bureau of Reclamation. The Bureau of Reclamation has never proposed modification of that requirement of Federal law; and on the contrary, the Bureau of Reclamation and the Secretary of the Interior have consistently through the 42 years since the 1902 Act, been zealous in maintaining compliance with section 8 of the 1902 Act.
>
> They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigatiodn development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws. Ample demonstration of

[51] Defendant's memorandum, p. 21, September 3, 1974.

> the effect of this law and policy of administration, in action, has been given in connection with the Central Valley Project. Water filings made by the State have been obtained by the Bureau of Reclamation by assignment, and vested water rights have been acquired by the United States, by purchase, the consideration amounting to millions of dollars and being agreeable to the vendors —all in conformity with state law."

In 1948, the Bureau repeated this view. The Bureau's Regional Director, in a letter to Representative Clair Engle of California, quoted from a letter of the Assistant Secretary of the Interior William E. Warne, as follows:[52]

> "As you know, the Sacramento Valley water rights are protected by: (1) Reclamation law which recognizes State water law and rights thereunder; (2) the State's counties of origin act, which is recognized by the Bureau in principle; and (3) the fact that Bureau filings on water rights are subject to State approval."

In 1950, Congress received a memorandum from the Commissioner of Reclamation entitled "Administrative Practice in Regard to Federal Appropriation of Water," a copy of which was also submitted to the Supreme Court in the *Gerlach* case. The Commissioner stated in pertinent part as follows:[53]

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[52] Defendant's memorandum, p. 22, September 3, 1974, quoting from 95 Cong.Rec. A961, 81st Cong., 2d Sess. (1948).

[53] Defendant's memorandum, pp. 22-23, September 3, 1974, quoting Hearings on S. 1275 before the Subcommittee on Irrigation & Reclamation, Senate Comm. on Int. & Ins. Affairs, 88th Cong., 2d Sess., 311, 312, 320, 322, 323 (1964).

> "It is the practice of the Government to make appropriations of water from unnavigable streams in accordance with the provisions of state law (sec. 8, act of June 17, 1902, 32 Stat. 388). Before taking any steps toward the appropriation of water in any State, either by posting and recording notice of appropriations or filing application for permits to appropriate, full report as to the advisability of making such appropriation shall be submitted . . .
>
> It appears from the foregoing that in practice the Department has generally regarded section 8 of the Reclamation Act of 1902 as directory of the course of action to be followed in its assertion of water rights for projects governed by the Federal Reclamation Laws and with respect to the recognition of rights under various State statutes and that it has followed the line marked out by that section regardless of whether the stream is navigable or nonnavigable.
>
> Public statements by officials of the Department of the Interior in recent years with the approval of the Department are in conformity with this practice.
>
> Whatever the correct theory be as to ownership of unappropriated water, the net effect as regards State laws is the same so far as the Bureau of Reclamation and its activities are concerned. This is true because of section 8 of the 1902 act. The Bureau of Reclamation and the Secretary of the Interior are required by that law to proceed in conformity with State water laws; they do so proceed; and they would strenuously

oppose any change in the Federal law which now requires them to proceed in conformity with State water laws.

Should the United States, in connection with the development of the Central Valley Project, as now or as it may be in the future authorized, desire to obtain or develop additional water supply for the project, it is and will be the intention and the clear policy of the Bureau of Reclamation and the Secretary of the Interior to obtain or develop the additional water supply by proceeding in conformity with the State law."

In 1952, Secretary of the Interior Oscar L. Chapman, wrote the following words in a letter to California Governor Earl Warren: [54]

"The State of California of course asserts a certain scope of jurisdiction of the water of the State and of its use, and by section 8 of the Reclamation Act of 1902 . . . Congress enjoined the Secretary of the Interior, in carrying out the provisions of the act, to proceed in conformity with the State law. . . . The current estimate of the cost of the construction of the Central Valley Project is $700,000,000.00. The recoupment of the legally reimbursable portion of this Federal expenditure is necessarily dependent on a legal freedom, as well as a legally sanctioned duty, on the part of the United States to operate the project as it has been planned by both the State of California and the United States. This freedom

[54] Defendant's memorandum, pp. 23-24, September 3, 1974, quoting from CVP Documents, Part 1, 810-812 (1958).

in turn depends on the validity and extent of the rights of the United States to store, divert, and use water under the law of California. These rights have their inception in certain applications by the California Director of Finance to appropriate unappropriated water, which have been or are to be assigned by him to the United States, in certain applications made by the United States itself, and in already vested rights to the use of water which have been acquired by the United States from private parties through a negotiated purchase or inverse condemnation involving the payment of compensation."

The United States has not disputed the making of the statements cited by California, but rather has interpreted both their meaning and their relevancy differently than has California. The United States contends, *inter alia*, that the statements were all made prior to 1952 in a non-adversary proceeding and "are not likely to have the clarity one should look to to find the precise position of litigants," [55] that the statements were all made prior to a number of very important court decisions which helped to define Section 8, and that in any case, the views expressed in the statements are entirely consistent with the notion that the federal government must comply with the *forms* of state law, but only on the basis of comity.[56]

[55] It is apparent, of course, that at least some of the statements were made after 1952.

[56] Plaintiff's memorandum, pp. 28-30, October 11, 1974.

As to the *actual* practice of the Bureau of Reclamation in California, affidavits have been submitted by California which assert that since 1938, the State Board has received 51 applications from the federal government to acquire water for various elements of the Central Valley Project. California notes that 41 of those applications were *conditionally* approved.[57] The United States does not dispute this, but asserts that it has consistently maintained to the State Board that it was appearing only for reasons of comity.[58]

In analyzing the statements and actions, two points are noteworthy. The Supremacy Clause of the United States Constitution is a limitation upon the states according to which federal law cannot be subordinated to state regulation within the areas of Congress' exclusive legislative powers. *People of the State of California ex rel State Water Resources Control Board* v. *Environmental Protection Agency*, 511 F.2d 963 (9th Cir. 1975). As noted earlier in this opinion both parties to this action have admitted that because of the national implications inherent in reclamation, Congress could have afforded all power and control over federal reclamation projects to the federal government, giving no power and control to the states. See *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 294, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958).

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[57] Defendant's memorandum, p. 24, September 3, 1974.

[58] Plaintiff's memorandum, p. 54, October 11, 1974. California does not dispute this assertion. See Defendant's memorandum, pp. 4-5, November 19, 1974.

California's position, however, is that the 1902 Act was a manifestation of Congress' intent to give states certain powers in the operation and control of federal reclamation projects. To accept California's position however, would require a finding that the 1902 Act waived exclusive federal jurisdiction. Waivers of exclusive federal jurisdiction, like waivers of sovereign immunity, are to be strictly construed. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *People of the State of California ex rel State Water Resources Control Board* v. *Environmental Protection Agency*, 511 F.2d 963 (9th Cir. 1975).

Secondly this court must remain mindful of the admonition of the Ninth Circuit Court of Appeals in *Turner* v. *Kings River Conservation District*, 360 F.2d 184, 198 (9th Cir. 1966):

> ". . . [R]eason precludes an interpretation of the general provisions of Section 8 of the Reclamation Act [of 1902] . . . which would impute to Congress an intention to frustrate its plans for this project by subjecting it to the risk that it might never be used for some of the authorized purposes, should a state permit not be forthcoming."

Certainly, all the administrative pronouncements and actions cited above are susceptible to either the interpretation advanced by California or the interpretation advanced by the United States. Viewed, however, in the perspective of the Congressional history and judicial decisions relating to Section 8 previously

cited in this opinion, this court is constrained to reject the interpretation advanced by California as being inconsistent with the Congressional history and those judicial decisions. On the other hand, all the administrative statements and actions are consistent with the view that the Bureau does and will respect existing state water laws and further that the Bureau does and will comply with state filing requirements *on the basis of comity.*

CONTENTIONS IN THE NATURE OF ESTOPPEL

As an alternative argument, California has raised several issues in the nature of estoppel against the United States. This alternative argument is grounded on the proposition that even if federal law precludes state control of federal reclamation projects in general, factors inherent in the instant case would estop the United States from contesting the authority of the State Board to issue Decision 1422. These contentions will be discussed seriatim.

(1) Equitable estoppel.

California contends that the United States should be equitably estopped from denying the authority of the Board, particularly as to Decision 1422, because the United States has consistently submitted to the Board, or its predecessor, applications for permits to appropriate unappropriated water for the Central Valley Project.

California has cited the case of *United States* v. *Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970), *Brandt* v. *Hickel*, 427 F.2d 53 (9th Cir. 1970), and *Gestuvo* v. *District Director*, 337 F.Supp. 1093 (Cal. 1971), for the proposition that the United States cannot be estopped in its sovereign capacity, but can be estopped in its proprietary capacity. Such a distinction, however, is not the law in this circuit.

Equitable estoppel may, under certain circumstances, be applied against the United States without regard to its "capacity", whether proprietary or sovereign. *United States* v. *Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973). As the Ninth Circuit Court of Appeals stated in *Lazy FC Ranch:* [59]

> "[E]stoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by imposition of estoppel. . . . This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign . . . although we may be more reluctant to estop the government when it is acting in this capacity."

The test of estoppel applied in this circuit was outlined in *Georgia-Pacific* at 421 F.2d at 96: (a) the party to the estopped must know the facts; (b) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (c) the latter must

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[59] 481 F.2d at 989.

be ignorant of the true facts, and (d) he must rely on the former's conduct to his injury.

If in fact there is a legitimate disagreement between the United States and California as to the true nature of their relationship regarding the acquisition of water to develop federal reclamation projects, then it can hardly be said that the United States "knew" the true facts and thereby "induced" California to engage in detrimental conduct. Further, this court is doubtful whether the expenditure of time and effort by the State Board in the conduct of hearings can rise to the level of "injury" envisioned by the equitable estoppel doctrine.

California Water Code § 1360 provides that any person interested in any application for a permit to appropriate water may within 30 days after final action by the Board file a petition for a writ of mandamus in the Superior Court to inquire into the validity of the Board's action. California Code of Civil Procedure § 1094.5 provides for the mechanism and procedures on review of administrative actions.

At no time did the United States seek a direct appeal of Decision 1422 to the California courts. Rather, the United States initiated the instant declaratory relief action in federal court. This failure to pursue California's mandamus provisions, argues California, makes Decision 1422 *res judicata* and, through the doctrine in collateral estoppel, prevents attack in this court on issues and matters decided by the Board in Decision 1422.

The doctrines of *res judicata* and collateral estoppel rest upon considerations of economy of judicial time and the public policy favoring the establishment of certainty in legal relations. The doctrine of *res judicata* has a double aspect: (1) it precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction; and (2) any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies in a subsequent lawsuit on a different cause of action. The latter aspect of *res judicata's* double nature is more properly called collateral estoppel. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 68 S. Ct. 715, 92 L.Ed. 898 (1948); *Teitelbaum Furs, Inc.* v. *Dominion Insurance Co., Ltd.*, 58 Cal.2d 601, 604, 25 Cal.Rptr. 559, 375 P.2d 439 (1962).

Both the *Sunnen* case and the *Teitelbaum* case indicate, however, that a primal and essential element necessary for *res judicata* and collateral estoppel is that the court in the first action be a "court of competent jurisdiction". The rendition of a judgment without jurisdiction is a usurpation of power and makes the judgment void. 46 Am.Jur.2d Judgments § 22 (Bancroft-Whitney 1969). Before a judgment may operate as a conclusive determination of a cause of action, or of the issues litigated therein, it is necessary that it should have been rendered by a court of competent jurisdiction of the parties and of the subject matter or cause of action. 46 Am.Jur.2d Judg-

ments § 446 (Bancroft-Whitney 1969). In dealing with an assertion of *res judicata* and its progeny collateral estoppel, this court may consider whether the subject matter, the issues and the character of the judgment rendered were of a class within the scope of the powers of the Board. 46 Am.Jur.2d Judgments § 446 (Bancroft-Whitney 1969).

It is apparent from the previous discussion of Section 8, that the Board acted *ultra vires* its authority vis a vis the Bureau. In a very real sense the Board has no jurisdiction over the Bureau, but may only, because of comity, be asked to determine the availability of unappropriated water. As to the Bureau, the Board is not a "court of competent jurisdiction", but rather, once a determination has been made that unappropriated water is available, the Board functions in a purely ministerial manner in issuing permits to the Bureau. Where the Board seeks to do more than make the determination of availability of unappropriated water and, as in the instant case, attempts to impose terms and conditions on the granting of a permit to appropriate water for a federal reclamation project, the United States need not pursue California appellate remedies, but rather, could appropriately turn to a federal court in a declaratory relief action for the purpose of interpreting and clarifying federal law.

(3) Effect of Decision 1422.

As a concommitant to its estoppel arguments, California has asked this court to conclude as a matter of

law that Decision 1422 does not materially alter or conflict with the purposes of the New Melones Project. This contention is based primarily upon the reasoning that the United States will be allowed to acquire additional water for the project once it is able to show a need for additional water and once it develops a specific plan for the use of such water. California's argument in this regard is that Decision 1422 does not prevent the fulfillment of the project's purposes, but instead merely temporarily denies a part of the water sought by the United States until it can show a specific and identifiable need for the water.

The United States has strenuously argued that the conditions and terms sought to be imposed by Decision 1422 do in fact alter or conflict with the purposes of the New Melones Project.

It appears to this court, however, that the question of the effect of Decision 1422 on the purposes of the New Melones Project is simply not material to the disposition of this case. As this opinion has previously noted, the "jurisdiction" of the Board in regard to the construction and operation of federal reclamation projects—once those projects have been approved—extends only so far as the determination of the availability of unappropriated water. Beyond that point, the Board has no jurisdiction. Therefore, *any* conditions or terms imposed by the Board must be considered *ultra vires* and "in conflict" with the purposes of the federal reclamation project.

(4) Public Policy.

Finally, California contends that if the United States prevails in its position, California will have no voice whatsoever in the use of its waters stored at federal reclamation projects, and this would be against the public interest of the people of California.

This contention ignores several basic facts. As an initial matter, California itself authorized the Central Valley Project through the Central Valley Project Act of 1933, Cal.Stats. Ch. 1042. Thereafter, California actively solicited federal monies and support for the development of the CVP and the New Melones Project. As recently as last year, the California electorate voted in favor of continued development of the New Melones Project.[60] California has not contended that its input was not sought or that its law was not consulted in the planning process of the New Melones Project.

When speaking of the public interest of the people of California, it is useful to keep this case in perspective. This court does not view this case as a confrontation between environmentalists and conservationists on the one hand versus industrial, agricultural and municipal water users on the other. The primal question before this court is one of state versus federal power as to the operation and control of federal re-

[60] During the 1974 California Primary, California voters rejected Proposition 17, the so-called "Deliver the River" Proposition which would have required the State of California to seek stoppage of the New Melones Project.

clamation projects. It is the sort of case which inevitably arises in the multiple sovereignty of a federal system of government. As such, this court must consider not only the public interest of the people of California as Californians, but also as citizens of the United States.

APPROPRIATENESS OF SUMMARY PROCEEDINGS

California's motions for judgment on the pleadings and for summary judgment are grounded on the premise that the case involves interpretations of federal law and therefore the issues in the case are legal, rather than factual. The question presented by a motion for judgment on the pleadings pursuant to F.R.C.P. 12 is solely one of law and, if an issue of fact is raised by the pleadings, the motion must be denied. Summary judgment, pursuant to F.R.C.P. 56, is only appropriate where there are no material facts in dispute and a party is entitled to judgment as a matter of law.

From the face of the complaint itself, issues of fact are raised[61] and thus in a technical sense, judgment on the pleadings is inappropriate.

Notwithstanding that issues of fact are raised on the face of the complaint, this court agrees with Cali-

[61] For example, the complaint asks this court to find that the conditions and terms imposed by Decision 1422 conflict with the construction and operation of the New Melones Project.

fornia that no *material* fact is in dispute. This court further agrees with California that this case involves legal questions concerning which judgment can be granted as a matter of law. Accordingly, summary judgment is appropriate. However, as this opinion has indicated, judgment is appropriate for the United States, a non-moving party. The question thus arises: Can summary judgment be granted in favor of a non-moving party?

It would seem that where, as in the instant case, both parties have been afforded a full and fair opportunity to present their case, and where summary judgment is appropriate, a court should grant summary judgment to a non-moving party without the formality of a cross-motion for summary judgment.[62] See *Hennessey* v. *Federal Security Administrator*, 88 F.Supp. 664 (Conn. 1949); *Local 453* v. *Otis Elevator Company*, 314 F.2d 25 (2d Cir. 1963).

There is no doubt that summary judgment is applicable to a proceeding for declarator relief. 6 Moore's Federal Practice § 56.17 [19] (1974). Accordingly:

Declaratory judgment is entered as follows:

(1) The United States can appropriate unappropriated water necessary for use in any federal re-

[62] It should be noted that California has consistently admitted in its pleadings and in open court that should this court find against it as a matter of law, then summary judgment would be appropriate for the non-moving party, the United States.

clamation project within the State of California, but must first, in accordance with comity, apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water;

(2) When the United States submits applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available;

(3) Nothing contained in Section 8 of the 1902 Act or in any other presently existing federal law, regulation or administrative directive allows the California State Water Resources Control Board to impose any terms or conditions in permits issued to the United States as a result of applications to the Board by the United States for allocations of unappropriated water;

(4) Decision 1422 is void in all respects where it attempts to impose terms and conditions of any kind upon the acquisition by the federal government of unappropriated waters and said terms and conditions may relate to the control, development or operation by the federal government of the New Melones Project.

California's motion for summary judgment is denied and summary judgment is granted for the United States in accordance with the views expressed in this opinion.

It is so ordered.

APPENDIX B

ORDER

IT IS HEREBY ORDERED that Applications 14858 and 14859 be, and they are, assigned to the United States Bureau of Reclamation, subject, in conformity with Section 10505 of the Water Code, to any and all rights of any county in which the water sought to be appropriated originates to the extent that any such water may be necessary for the development of such county.

IT IS FURTHER ORDERED that Applications 14858, 14859, 19303 and 19304 be approved in part, and that permits be issued to the United States Bureau of Reclamation subject to the following conditions and limitations:

1-a. The water appropriated under the permit issued pursuant to Application 14858 shall be limited to the quantity which can be beneficially used and shall not exceed 980,000 acre-feet per annum by storage to be collected from November 1 of each year to June 30 of the succeeding year. Until further order of the State Water Resources Control Board, the water shall be used only for preservation and enhancement of fish and wildlife, recreation and water quality control purposes.

1-b. The water appropriated under the permit issued pursuant to Application 14859 shall be limited to the quantity which can be beneficially used and shall not exceed 6,000 cubic feet per second by direct

diversion to be diverted from January 1 to December 31 of each year and 980,000 acre-feet per annum by storage to be collected from November 1 of each year to June 30 of the succeeding year to be used for power purposes.

1-c. The water appropriated under the permit issued pursuant to Application 19303 shall be limited to the quantity which can be beneficially used and shall not exceed 1,420,000 acre-feet per annum to be collected from November 1 of each year to June 30 of the succeeding year to be used for power purposes.

1-d. The water appropriated under the permit issued pursuant to Application 19304 shall be limited to the quantity which can be beneficially used and shall not exceed 1,420,000 acre-feet per annum by storage to be collected from November 1 of each year to June 30 of the succeeding year. Until further order of the State Water Resources Control Board, the water shall be used only for preservation and enhancement of fish and wildlife, recreation and water quality control purposes.

2. Until further order of the Board, permittee shall impound in New Melones Reservoir only such water as is necessary to provide (a) not in excess of 98,000 acre-feet per annum for the preservation and enhancement of fish and wildlife to be released at a rate specified by the California Department of Fish and Game, plus (b) such additional water as is necessary to maintain the water quality conditions set forth in paragraph 5. The above amounts are in addition to water stored for satisfaction of prior rights

at existing Melones Reservoir and for flood control. No additional impoundment shall be allowed for power and recreational purposes. Further order of the Board shall be preceded by a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the permittee has firm commitments to deliver water for such other purposes. The Board reserves jurisdiction for the purpose of establishing dry year criteria at the time such impoundment is approved.

3. Before any water is impounded in New Melones Reservoir, permittee shall file with the Board a reservoir operation study showing the water level elevations required to provide the yield specified in paragraph 2. The study shall include details of the permittee's proposed reservoir clearing plan to show the manner in which clearing will progress as additional storage is authorized. A reservoir operation schedule shall be submitted by the permittee which shall be subject to approval of the Board. The study shall be updated at least once every five years until further order of the Board.

4. Permits issued pursuant to Applications 14858 and 19304 shall authorize the use of water for consumptive purposes only in the counties of Stanislaus, Calaveras, Tuolumne and San Joaquin. A petition to amend the permits to include other specific areas will be considered by the Board upon a showing that water from other CVP sources is ont available to

serve such areas. Any use of water for consumptive purposes outside the counties of Stanislaus, Calaveras, Tuolumne and San Joaquin that may be authorized later shall be subordinate to beneficial use within said counties and shall terminate when contracts are executed and the water is needed for beneficial use within said counties.

5. Releases of conserved water from New Melones Reservoir for water quality control purposes shall be scheduled so as to maintain a mean monthly total dissolved solids concentration in the San Joaquin River at Vernalis of 500 parts per million or less and a dissolved oxygen concentration in the Stanislaus River as specified in the Water Quality Control Plan (Interim), San Joaquin River Basin 5C, State Water Resources Control Board, June 1971.

In the event that the Water Quality Control Plan (Interim) is amended or superseded, the foregoing water quality objectives shall be modified to conform to then current criteria.

6. The State Water Resources Control Board reserves jurisdiction over these permits for the purpose of revising water release requirements for water quality objectives and fish releases and for establishing dry year criteria pursuant to studies to be conducted by the permittee and other parties in an effort to better define water needs.

7. Permittee shall file with the Board at least biennially a report of water diversions and use along the Stanislaus River and San Joaquin River between New Melones Dam and the Vernalis gage which will

show any increased diversions subsequent to the beginning of releases of water under this permit, which diversions may be encroaching on the water supply provided for preservation and enhancement of fish and wildlife and for water quality control, and will show what steps, if any, permittee is taking to prevent any such encroachment.

8. Permittee shall file with the Board an annual report showing (a) daily storage level in New Melones Reservoir, (b) daily record of total dissolved solids at Vernalis, and (c) daily record of minimum dissolved oxygen level for the day at Ripon or at an alternate location approved by the Board.

9. The maximum quantities stated herein may be reduced in the license if investigation warrants.

10. Construction work shall be completed on or before December 1, 1980.

11. Complete application of water to the uses authorized by the permit shall be made on or before December 1, 1990.

12. Progress reports shall be submitted promptly by permittee when requested by the State Water Resources Control Board until license is issued.

13. All rights and privileges under this permit, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

This continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to minimizing waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (3) suppressing evaporation losses from water surfaces; (4) controlling phreatophytic growth; and (5) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action wil be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and oportunity for hearing, that such specific requirements are physically and financially feasible and are apropriate to the particular situation.

14. This permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose.

15. Permittee shall allow representatives of the State Water Resources Control Board and other parties, as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with the terms of this permit.

16. In compliance with Section 5943 of the Fish and Game Code, permittee shall accord to the public, for the purpose of fishing, reasonable right of access to the waters impounded by the dam under this permit during the open season for the taking of fish subject to the regulations of the Fish and Game Commission.

17. Permittee shall install and maintain an outlet pipe of adequate capacity in his dam as near as practicable to the bottom of the natural stream channel, or provide other means satisfactory to the State Water Resources Control Board, in order that water entering the reservoir which is not authorized for appropriation under this permit may be released.

18. In accordance with the reuirements of Water Code Section 1393, permittee shall clear the site of the reservoir of all structures, trees, and other vegetation which would interfere with the use of the reservoir for water storage and recreational purposes. This provision, however, shall not preclude the permittee from retaining vegetation cover in selected areas as required for the protection of wildlife. Clearing operations shall be coordinated with authorized increases in storage levels.

19. Rights under this permit are, and shall be, subject to existing rights determined by the Stanislaus River Adjudication Decree of Superior Court of San Joaquin County dated November 14, 1929, Action No. 16873 with Supplemental Decrees dated February 24, 1930; March 8, 1934; May 8, 1935 and November 29, 1960, insofar as said adjudicated rights

are maintained, and such other rights as may presently exist.

20. The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the State Water Resources Control Board if, after notice to the permittee and an opportunity for hearing, the Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the Board finds that (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

21. In order to prevent degradation of the quality of water during and after construction of the project, permittee shall file immediately a report pursuant to Water Code Section 13260 and shall comply with any waste discharge requirements imposed by the California Regional Water Quality Control Board, Central Valley Region, or by the State Water Resources Control Board.

22. Before making any change in the project determined by the State Water Resources Control Board to be substantial, permittee shall submit such change to

the Board for its approval in compliance with Water Code Section 10504.5(a).

23. This permit shall be subject to appropriation by storage upstream from New Melones Reservoir for stockwatering and recreational purposes, provided the individual capacities of reservoirs for such purposes do not exceed 10 acre-feet and the reservoirs are kept free of phreatophytes.

24. This permit shall be subject to the following agreements between the permittee and other parties:

(a) The "Agreement and Stipulation" dated October 24, 1972 and executed by the permittee, Oakdale Irrigation District and South San Joaquin Irrigation District.

(b) The agreement between the permittee and Tuolumne County Water District No. 2 dated November 29, 1972.

(c) The agreement dated July 31, 1972 between permittee and Calaveras County Water District.

Reference to the above three agreements shall not be construed as a finding by the State Water Resources Control Board with respect to the rights of any of the parties involved.

25. This permit does not authorize the use of any water outside the counties of origin which is necessary for the development of the counties.

IT IS FURTHER ORDERED that the hearing on this matter will be reconvened not later than July 1, 1986 for the purpose of considering the status of the items of reserved jurisdiction.

Dated: April 4, 1973

/s/ W. W. Adams
W. W. ADAMS, Chairman

/s/ Ronald B. Robie
RONALD B. ROBIE, Vice Chairman

/s/ E. F. Dibble
E. F. DIBBLE, Member

/s/ Roy E. Dodson
ROY E. DODSON, Member

/s/ Mrs. Carl H. Auer
MRS. CARL H. (JEAN) AUER, Member

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IN THE

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OCTOBER TERM, 1977

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Respondent.

California's Reply Brief

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California's Reply Brief

We file this brief under Rule 24.4, to respond to new matters raised in the opposing brief of the United States.

1. Inconsistency of the United States' Argument and the Lower Decisions.

In its opposing brief, the United States supports the decisions of the lower courts by arguing a theory that was not relied on by the courts, and that is actually inconsistent with the theory on which the courts relied. The lower courts held that section 8 of the Reclamation Act of 1902 requires the U. S. Bureau of Reclamation (the "Bureau") to comply with the "forms" but not the "substance" of state appropriation laws, and thus exempts the Bureau from *all* conditions resulting from the state laws. However, the United States, in its opposing brief, argues that the conditions imposed by

California in this case are invalid because they enable California "to assert control over the operation of the New Melones Project," and "conflict specifically with the congressionally approved plans and objectives of the New Melones Project." Brief for the United States in Opposition (hereinafter "U.S. Brief") 8, 9. Indeed, it would frame the issue as whether a state can impose "conditions that would give the State virtual control of the operation of the project." U.S. Brief 5. Thus, the United States appears to argue that the validity of state-imposed conditions depends on the nature of the conditions, in terms of whether they interfere with project operation or are inconsistent with congressionally-authorized project purposes. In short, the lower courts held that the conditions are invalid *per se,* without reference to their impact on project purposes or operation, and the United States argues that the conditions are invalid because of their impact on project purposes and operation. The United States, rather than relying on the novel theory of water law put forth by the lower courts, thus appears to accept our contention that the validity of the conditions depends on their nature and effect. Its argument convincingly shows the necessity for a review of the lower decisions by this Court.

Since the lower courts held that the conditions are invalid *per se*, they did not reach the question whether the conditions are inconsistent with project purposes or impair project operations. Indeed, as was noted below, the United States conceded at oral argument that it cannot now challenge the conditions on these grounds, since it failed to appeal from the administrative decision resulting in the issuance of the conditional permits. Pet. App. 9 n. 1. Hence, it would be inappropriate for the Court to deny our petition on grounds, as urged by the United States, that the conditions impair project purposes or operations.

We cannot fail to note that the United States has grossly misstated the nature and effect of the conditions in its opposing brief. The United States fails to mention that the major conditions involved in this case, conditions nos. 1 and 2, merely seek to defer impoundment of some project waters until the Bureau develops a plan for the use of the waters. Def. Ex. 2, pp. 14-15, 29-30. Thus, these conditions do not tell the Bureau how to operate the project, but merely require the Bureau to tell California what it intends to do with California's waters before storing them. Also, the United States fails to mention that the other, minor conditions, which are described at length in the United States' opposing brief, do no more than repeat specific provisions that are already found in the congressional act authorizing the New Melones Project, or repeat the terms of contracts that have already been signed by the Bureau and California agencies, or simply adopt the Bureau's own estimates of how much water it needs for selected project purposes.[1] Thus, the conditions do not impair project purposes, or interfere with project operations.

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1. For instance, the United States points out that condition no. 4 requires a preference to be given to water users in the four counties which comprise the water basin in which the New Melones Project is located, and that condition no. 25 similarly requires a preference to be given to these four "counties of origin." U.S. Brief 8, 9 n. 4. However, the United States fails to mention that these conditions merely echo a provision in the congressional act authorizing the New Melones Project, which requires a preference to be given to "all existing and anticipated future needs within that basin," 76 Stat. 1191 (1962), *i.e.* the basin in which the four counties are located.

The United States points out that condition no. 5 requires that storage releases be scheduled to maintain a particular concentration of total dissolved solids. U.S. Brief 8. However, the United States fails to mention that this condition merely repeats a contractual obligation which results from an agreement voluntarily entered into by the Bureau and a California agency. Def. Ex. 2, p. 11.

2. The Federal Reserved Rights Doctrine.

In our petition, we assumed that the United States would seek to sustain its position by arguing that, under the "implied reservation" doctrine, it has a federal reserved water right that is beyond the reach of California law, and that section 8 does not abrogate the federal reserved water right. Under the "implied reservation" doctrine, the United States has the right to use water, under the Commerce and Property Clauses of the U. S. Constitution, independently of state law. *Cappaert v. United States,* 426 U.S. 128, 138 (1976); *Arizona v. California,* 373 U.S. 546, 597-598 (1963); *United States v. District Court,* 401 U.S. 520, 522-523 (1971); *Winters v. United States,* 207 U.S. 564 (1908). However, in its opposing brief, the United States makes the remarkable concession that "the United States has not claimed any reserved rights in connection with the New Melones Project." U.S. Brief 11. If the United States thus lacks a reserved water right, it clearly must comply with state appropriation laws. That is, the United States obtains water

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The United States points out that condition no. 2 provides that the Bureau, in storing water for protection of fish and wildlife, can impound no more water than will result in the annual release of 98,000 acre-feet of water. U.S. Brief 8. However, the United States fails to mention that this figure was based on the Bureau's own estimates of the water it needs to impound in order to release water for protection of fish and wildlife. Def. Ex. 2, pp. 20-21.

The United States points out that condition no. 14 prohibits the Bureau from storing water during certain seasons of the year. U.S. Brief 8. However, the United States fails to mention that this limitation was inserted because unappropriated water was not available during those selected seasons. Def. Ex. 2, pp. 10, 34. The lower courts implicitly upheld this condition, since they concluded that the State Board has jurisdiction to determine the availability of unappropriated water.

The remaining conditions described by the United States merely involve mundane matters, such as the submission of reports by the Bureau to the State Board, that have no effect on project purposes or operation.

rights independently of state law under the "implied reservation" doctrine, which in turn rests on the United States' constitutional authority to regulate commerce and control federal lands; if the United States lacks a reserved water right, it has no constitutional authority to acquire its water rights independently of state law, and instead acquires its water rights in the same manner as private appropriators. This Court has held that private appropriators are fully subject to state appropriation laws. *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935). Hence, the United States, by its concession, has abandoned the sole legal theory which this Court has used in past cases to exempt federal water rights from state laws, and has thus abandoned the sole legal theory that might sustain the judgment below. Its concession might thus well merit a summary reversal of the lower judgment.

3. The Nebraska, Ivanhoe and Arizona Decisions.

In its opposing brief, the United States fails to make reference to the decision in *Nebraska v. Wyoming,* 295 U.S. 40, 42 (1935), where this Court clearly held that, under section 8, the Bureau's authority to "impound and release waters . . . are subject to the authority of Wyoming," and that the Bureau "must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator. . . ." Instead, the United States supports its position by reference to this Court's decisions in *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275 (1958), and *Arizona v. California,* 373 U.S. 546 (1963). As noted in our petition, the Court in *Ivanhoe* held that the states cannot interfere with "specific and mandatory" congressional laws and policies, such as the acreage limita-

tion set forth in section 5 of the Reclamation Act of 1902. Pet. 16-17. Similarly, it was held in *Arizona* that the states cannot interfere with the specific authority of the Secretary of the Interior to enter into contracts with water users under section 5 of the Boulder Canyon Project Act, 45 Stat. 1057 (1928), 43 U.S.C. §§ 617-617t (1970), which governs the Colorado River. 373 U.S. at 587-588. Thus, those decisions support our view that the validity of state-imposed conditions depends on whether they are inconsistent with specific, mandatory reclamation laws or policies established by Congress.

However, the United States relies on *dicta* in *Ivanhoe* and *Arizona,* where the Court stated that section 8 "requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights . . .," and cannot be construed to require "the United States to deliver water on conditions imposed by the State." 357 U.S. at 291-292. However, this *dicta* supports the position of California, not the United States. The primary state-imposed conditions in this case, which defer impoundment of some project waters until the Bureau develops a plan for their use, involve the Bureau's efforts "to acquire water rights," not its efforts "to deliver water . . . ." Accordingly, the lower courts did not rest their decisions, even in part, on the *dicta* in *Ivanhoe* and *Arizona,* and even conceded that the *dicta* was inapplicable in this case. U. S. Brief, App. 43a-

44a. Thus, the United States again seeks to sustain the lower decisions on grounds different from those on which the lower decisions were based.

CONCLUSION

For the foregoing reasons, it is respectfully urged that our petition be granted.

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In the Supreme Court of the United States

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Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

OPINION BELOW

The decision of the U. S. Court of Appeals is reported at 558 F. 2d 1347. App. I, 28-41. The decision of the district court is reported at 403 F. Supp. 874. App. I, 42-96.

JURISDICTION

The final decision of the U. S. Court of Appeals was rendered on August 12, 1977. The petition for writ of certiorari was filed on August 19, 1977, and granted on December 2, 1977. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does section 8 of the Reclamation Act of 1902 require the Bureau of Reclamation, in acquiring its rights to unappropriated water under the act, to acquire its rights under the states' appropriation laws? Or, instead, does the Bureau acquire a federal reserved water right independently of state law, under the "implied reservation" doctrine?

2. If section 8 requires the Bureau of Reclamation to acquire its water rights under the states' appropriation laws, is the Bureau exempt from such laws to the extent that such laws provide for conditions to protect the "beneficial use" of water, in instances where such conditions are not inconsistent with specific federal reclamation laws or with the purposes of the federal reclamation project?

3. If section 8 does not require the Bureau of Reclamation to acquire its rights under the states' appropriation laws, must the Bureau nonetheless comply with conditions resulting from such laws when it elects to acquire, independently of section 8, (1) its own water rights under the states' appropriation laws, or (2) an assignment of water rights acquired by a state agency under the states' appropriation laws?

FEDERAL LAWS INVOLVED

This case involves an interpretation of section 8 of the Reclamation Act of 1902, 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383 (1970).

STATEMENT OF THE CASE

The primary question raised in this case is whether section 8 of the Reclamation Act of 1902, 32 Stat. 388, 390 (1902), 43 U.S.C. §§ 372, 383 (1970), which requires the U.S. Bureau of Reclamation to "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water,[1] requires the Bureau to comply with the states' appropriation laws in acquiring and using unappropriated water for federal reclamation projects. Since water from such projects is ultimately distributed to non-federal users, such as agricultural, municipal and industrial users, the question is whether Congress has authorized the states to exercise their traditional control over water that is used by their own citizens, and that affects the economic growth and development of the states.

1. The full text of § 8 appears at page 18, *infra*.

1. The New Melones Project.

The Reclamation Act of 1902, 32 Stat. 388 (1902), as amended 43 U.S.C. §§ 371 *et seq.* (1970), establishes a program for federal construction and operation of reclamation projects in 17 western states.[2] The projects divert and store waters that are ultimately distributed to agricultural, municipal and industrial interests. Under the act, Congress has authorized many reclamation projects, the largest of which is a vast array of dams, reservoirs and waterways in California collectively known as the Central Valley Project ("CVP"). See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 727-735 (1950); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 280-284 (1958). The CVP was originally authorized by the Rivers and Harbors Act of 1935, 49 Stat. 1028, and the Rivers and Harbors Act of 1937, 50 Stat. 844, 850. The CVP is operated by the Bureau of Reclamation ("Bureau"). The waters of the CVP arise and flow solely in California.

As water needs and uses have expanded in California, Congress has authorized additional units of the CVP. One such unit is the New Melones Project, authorized by the Flood Control Act of 1944, 58 Stat. 887, and the Flood Control Act of 1962, 76 Stat. 1180, 1191. The purposes of the

2. The 17 states are, in addition to California, Arizona, Colorado, Idaho, Kansas, Montana, Nevada, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming. 32 Stat. 388 (1902), as amended 43 U.S.C. § 391 (1970). All these states have filed an *amicus* brief in support of California's position.

project are flood control, irrigation, municipal use, industrial use, power, recreation, water quality control and protection of fish and wildlife. *Ibid.* The main feature of the project, when completed, will be a dam on California's Stanislaus River, with the capacity to impound 2.4 million acre-feet of water. R. 830. The lands acquired for the project were acquired by purchase and condemnation, not by withdrawal of lands from the public domain. Df. Ex. 3(a), 3(b), 3(c), 3(d) (App. II, 43, 52, 60, 64). The waters destined for the project arise and flow solely in California.

2. California's Appropriative Procedure.

Under California law, any person who appropriates unappropriated water in California must apply for, and receive, a permit from the State Water Resources Control Board ("State Board"). Cal. Wat. Code §§ 1201, 1225, 1250-1258, 1375-1415. The State Board issues the permit if it (1) determines that unappropriated water is available, (2) determines that the proposed use is "reasonable" and "beneficial," and (3) imposes such conditions in the permit as are necessary to insure the "reasonable" and "beneficial" use of water. Cal. Const., Art. X, § 2; Cal. Wat. Code §§ 1201, 1240, 1375; *Bank of America v. State Water Resources Control Bd.*, 42 Cal.App. 3d 198 (1974). California's permit procedure is similar to that of most other western states whose waters are utilized under the Reclamation Act of 1902. See note 25, *infra*.

The Bureau has consistently complied with California's appropriation procedures in acquiring its rights to unappropriated water for the CVP; in fact, it has never acquired its rights to unappropriated water except pursuant to such procedures. *United States v. Gerlach Live Stock Co., supra* at 740 n. 14; Df. Ex. 1, pp. 1-2 (App. II, 1-2); I CVP

Documents 717-720;[3] II CVP Documents 543-552. Its compliance with these procedures has taken two forms. First, it has applied directly to the State Board for its own permits. *Ibid.* Second, it has applied to the State Board for the assignment of permit applications previously filed by a State agency, the State Department of Finance. *Ibid.* The latter agency filed its applications beginning in 1927, so that the State—in anticipation of then-planned State-construction of the CVP—could obtain a prior right to the use of water, as against appropriators who filed later applications; the Bureau has sought the assignment of these applications so that it could obtain the benefits of these prior rights. I CVP Documents 717-718.[4] In effect, the Bureau has applied directly for its own rights, and for the assignment of State-held water rights.

3. Decision 1422.

The Bureau followed these two procedures in acquiring its rights to unappropriated water for the New Melones Project. It applied in 1960 for its own permits. Df. Ex. 3(c), 3(d) (App. II, 59, 63). It also applied in 1967 for the assignment of permit applications, filed in 1952 by the State Department of Finance, which the latter agency had agreed to assign to the Bureau subject to the State Board's approval.

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3. "CVP Documents" is a reference to "Central Valley Project Documents," a document published by the House of Representatives in two parts. Part I, entitled "Authorizing Documents," is published as House Document No. 416, 84th Cong., 2d Sess. (1956). Part II, entitled "Operating Documents," is published as House Document No. 246, 85th Cong., 1st Sess. (1957).

4. Under California law, an appropriator acquires a priority to the use of water based on the date that he submits his application for an appropriative permit to the State Board, a priority which continues after the application is approved by the State Board. Cal. Wat. Code §§ 1450, 1455.

Df. Ex. 3(a), 3(b), 4 (App. II, 41, 51, 69). All its applications were submitted after, rather than before, the project was authorized by Congress in 1944.

After lengthy hearings, the State Board issued Decision 1422 in 1973, resulting in the issuance of conditional permits to the Bureau. Df. Ex. 2 (App. II, 6-40). In the decision, the State Board found that unappropriated water is available for the New Melones Project during certain times of the year. Df. Ex. 2, p. 10 (App. II, 16). Accordingly, it (1) approved the applications filed by the Bureau, and (2) approved the applications filed by the State Department of Finance, and approved their assignment to the Bureau. Df. Ex. 2, pp. 1, 28 (App. II, 8-9, 33).

The State Board attached 25 conditions to the permits. Some conditions, which affect distribution of water, are based on specific provisions found in the congressional acts authorizing the New Melones Project.[5] Another reaffirms the Bureau's contractual obligations arising under its agreements with various California agencies.[6] Another incorporates the Bureau's own estimates of how much water

5. Condition no. 4 requires a preference to be given to water users in the four counties which comprise the water basin in which the New Melones Project is located, and condition no. 25 similarly requires a preference to be given to these four "counties of origin." Df. Ex. 2, pp. 31, 36 (App. II, 35, 40). These conditions echo a provision in the congressional act authorizing the New Melones Project that requires a preference to be given to "all existing and anticipated future needs within that basin," 76 Stat. 1191 (1962), *i.e.*, the basin in which the four countries are located.

6. Condition no. 5 requires that storage releases be scheduled to maintain maximum and minimum concentrations of certain chemical elements in the San Joaquin River, of which the Stanislaus River is a tributary. Df. Ex. 2, p. 31 (App. II, 35). This condition is based on a contractual obligation resulting from an agreement between the Bureau and California agencies, which has been incorporated into California's regional water quality control plans. Df. Ex. 2, p. 11 (App. II, 17).

it needs for selected project purposes.[7] Others require the Bureau to provide the State Board with specified reports, and to provide access to the project by the State Board.[8] Others require the Bureau to provide means to insure the release of waters which exceed those to which the Bureau is entitled.[9] Another provides that the Bureau cannot store water during those periods of the year when unappropriated water is unavailable.[10]

The most important conditions, nos. 1 and 2, defer impoundment of the full amount of water applied for by the Bureau, at least until the Bureau is able to show firm commitments, or at least a specific plan, for the use of the water. Df. Ex. 2, pp. 29-30 (App. II, 33-34). These conditions allow the Bureau to immediately impound water for two project purposes, *i.e.* for water quality control and for the protection of fish and wildlife. Df. Ex. 2, p. 30 (App. II, 34). The conditions also allow the Bureau to use the water

7. Condition no. 2 provides that the Bureau, in storing water for protection of fish and wildlife, can impound no more water than will result in the annual release of 98,000 acre-feet of water. Df. Ex. 2, p. 30 (App. II, 34). This figure is based on the Bureau's own estimates of the amounts of water necessary to protect fish and wildlife. Df. Ex. 2, pp. 20-21 (App. II, 26).

8. Conditions nos. 3, 7, 8, 12 and 21 require further or continuing study by the Bureau of water-related matters, and provide for the submission of specified water-related reports to the State Board. Df. Ex. 2, pp. 30-31, 32, 33, 35 (App. II, 34-35, 36, 39). Conditions nos. 15 and 16 provide for access to the project by representatives of the State Board and the public. Df. Ex. 2, p. 34 (App. II, 37-38).

9. Conditions nos. 17 and 18 require the Bureau to provide means for the release of excess waters, and to clear vegetation and structures from the reservoir site which would interfere with certain project purposes. Df. Ex. 2, p. 34 (App. II, 38).

10. Condition no. 14 prohibits the Bureau from impounding water during periods of the year when unappropriated water is available. Df. Ex. 2, p. 34 (App. II, 37). This condition was apparently upheld by the lower court, since it held that the State Board has jurisdiction to determine the availability of unappropriated water.

so impounded for the additional purposes of power and recreation. *Ibid.* Importantly, the conditions reserve jurisdiction to the State Board to reconsider its conditions when the Bureau is able to show that it has firm commitments for the use of additional water, and in any event no later than 1986. Df. Ex. 2, pp. 32, 37 (App. II, 36, 40).

Conditions nos. 1 and 2, in deferring full impoundment until the Bureau develops a plan for the water, are based on two important findings of fact contained in Decision 1422. First, the State Board found that the Bureau lacks a "specific plan," much less "firm commitments," for the use of water from the project. Df. Ex. 2, pp. 14, 15, 26, 30 (App. II, 19, 21, 31, 34). The lack of such a plan or commitments derives from the fact that the project was authorized by Congress for the purpose of providing water for the East Side Division, a proposed unit of the CVP.[11]

11. The report of the Army Corp of Engineers of March 22, 1962, which led to congressional authorization of the New Melones Project, commented:

> "A large reservoir at the New Melones site on the Stanislaus River could provide cyclic storage for the proposed East Side Division of CVP. This site is one of the few remaining undeveloped large capacity storage sites available in the Central Valley. The East Side Division canal is contemplated as the means for delivering irrigation water to the valley floor and foothill lands along the east side of the San Joaquin Valley." H.R. Doc. No. 453, 87th Cong., 2d Sess. 29 (1962).

The report of the Bureau of Reclamation of August 22, 1960, which also led to congressional authorization of the project, commented:

> "As you know the Bureau is currently engaged in a feasibility study of the East Side Division of the Central Valley Project to bring surplus northern California water to the water deficient area along the east side of the San Joaquin Valley. *The proposed New Melones dam, reservoir, and powerplant,* which we have been jointly studying, *is included as a part of the plan of development for the proposed East Side Division,* and the water and power developed will be integrated into the present and planned future additions of the Central Valley Project. The irrigation and power benefits supplied . . . for the benefit-cost analysis and cost allocation study reflect these assumptions. . . ." *Id.* at 83. (Emphasis added.)

However, this proposed unit has not won, and apparently will not win, congressional approval. Thus, the New Melones Project is apparently unable to serve its original purpose, and the Bureau has yet to devise an alternative plan for the use of project water.

Second, the State Board found that the full impoundment of water sought by the Bureau would have an adverse environmental effect in the Stanislaus River basin. According to the State Board, the impoundment of such waters would inundate approximately 13 miles of river upstream from the dam, thus destroying a 9-mile stretch of whitewater that provides unexcelled opportunities for river rafting; this stretch of whitewater, the State Board found, is the second most heavily used in the nation, and is a "unique asset to the state and nation." Df. Ex. 2, pp. 17-18, 23-24, 26 (App. II, 23, 28-29, 31).

Based on these findings, the State Board concluded:

> "By failing to present evidence of a specific plan to use the water conserved by the New Melones Project for consumptive purposes, the Bureau has failed in spirit if not in substance to meet the statutory requirements for approval of a permit to appropriate water for such purposes. . . . *The limited unappropriated water resources of the state should not be committed to an applicant in the absence of a showing of his actual need for the water within a reasonable time in the future.* When the evidence indicates, as it does here, that an applicant already has a right to sufficient water to meet his needs for beneficial use within the foreseeable future, rights to additional water should be withheld and that water should be reserved for other beneficial uses." Df. Ex. 2, pp. 15-16 (App. II, 21-22). (Emphasis added.)

Thus, Decision 1422 does not bar the impoundment of water necessary to satisfy the congressionally-authorized purposes of the project. Rather, it authorizes water for

certain purposes, and defers impoundment for other purposes until the Bureau develops a plan to serve those purposes. In fact, the United States recently advised this Court in another case that, concerning the effect of Decision 1422:

> "In any event, even if the State Board's decision is found to be binding on the federal agencies, its only effect would be to defer slightly the beneficial use of the full conservation yield of the project. Most of the project purposes were permitted by the Board's decision. *The decision does not render the project useless or fundamentally alter its value.*" Df. Ex. 7, p. 9. (Emphasis added.)[12]

12. This statement was made in a brief to the Court in opposition to a petition for writ of certiorari in *EDF v. Armstrong*, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974). The statement was based on a letter from the Army Corps of Engineers to Russell Train, then Chairman of the Council of Environmental Quality, which reads in part:

> "It is my understanding that the State board's opinion does not purport to restrict the impoundment of water in the future on the basis of the situation presently existing. The decision merely preserves the board's jurisdiction to decide whether to permit the impoundment for specific purposes at the time such impoundment is scheduled. For example, the decision does not bar the impoundment of water for consumptive use; it merely requires that before any water is impounded, the Bureau show that the benefits of any specific use will outweigh the damage to fish, wildlife and recreation, and that it has a firm commitment to deliver the water. . . . *The board, in its decision, has manifested its awareness of the dynamic nature of these needs.* On p. 27 of its opinion for instance, the board states that, while impoundment 'should not be permitted *at this time,*' 'there is a demonstrated need for the full yield of the project . . . at some time in the future' (emphasis added). At most, therefore, the result of this decision, even if upheld in court, would be to defer slightly the beneficial use of the full conservation yield of the project. Most of the project purposes are permitted by the decision. *The decision does not render the project useless, nor does it fundamentally alter the value of the project.*" Df. Ex. 8, p. 2 (App. II, 73-74). (First and third emphases added.)

4. The Proceedings Below.

The United States filed this action for declaratory relief, alleging that (1) the Bureau need not apply to the State Board for the right to appropriate unappropriated water for a federal reclamation project, (2) if the Bureau applies for such a right as a matter of "comity," the State Board must grant the right if unappropriated water is available and cannot attach conditions to the right, and (3) Decision 1422 is void to the extent that it attaches conditions to the water rights granted by the State Board to the Bureau. R. 9 (App. I, 19).

California contends that, (1) under section 8 of the Reclamation Act of 1902, the Bureau must acquire its rights to unappropriated water under state law, and must comply with conditions attached to the rights to the extent that such conditions are not inconsistent with Congress' reclamation laws and policies, or with the purposes of its reclamation projects, (2) the conditions in Decision 1422 are not inconsistent with Congress' reclamation laws and policies, or with the purposes of the New Melones Project, and (3) in any event, the Bureau must comply with conditions attached to State-owned water rights that are assigned to the Bureau. R. 101-106 (App. I, 21-27).

The district court granted summary judgment for the United States. App. I, 42-96. The court ruled that section 8 of the Reclamation Act of 1902 "requires" the Bureau, as a matter of "comity," to comply with the "forms" of state law by obtaining its right to appropriate unappropriated water under state law, thus rejecting the United States' position that it acquires its rights independently of state law. App. I, 68-69, 96. However, the court ruled that the state must grant the right if unappropriated water is available, and cannot attach conditions to the right; it

thus rejected California's position that the Bureau must comply with conditions to the extent that such conditions are not inconsistent with Congress' reclamation laws and policies, or with the purposes of its reclamation projects. *Ibid.* The court did not reach the question whether the conditions in Decision 1422 are consistent with Congress' reclamation laws and policies, or with the purposes of the New Melones Project.

On appeal, the Court of Appeals, relying primarily on the district court's analysis, affirmed the summary judgment. App. I, 28-41. However, the appellate court ruled that section 8 of the 1902 act *requires* the Bureau to comply with the "forms" of state law, and that the Bureau does not do so as a matter of "comity." App. I, 34. The appellate court also ruled that the Bureau is not bound by conditions in water rights that are based on State-filed applications assigned to the Bureau. App. I, 38-41.

SUMMARY OF ARGUMENT

I

Section 8 of the Reclamation Act of 1902 requires the Secretary of the Interior, in acquiring water for federal reclamation projects, to "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water. The simple, plain meaning of the section, as amplified by its legislative history, indicates that Congress intended to provide for state control of appropriation and distribution of water under the act, a result that was to be achieved by requiring the Secretary to acquire his water rights under state law. Congress provided for state control because water from federal reclamation projects is not consumed by the federal government; rather, it is ultimately consumed by non-federal interests, by agricultural, industrial and municipal groups whose activities are closely linked to the economic growth and development of the western states. Thus, Congress continued and extended the tradition that the western states control the allocation of waters among non-federal users, a tradition which Congress had recognized by the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877. Since the passage of the Reclamation Act of 1902, federal agencies have consistently complied with state law in acquiring and distributing water under the act, and have consistently acknowledged their obligation under section 8 to do so.

II

Under the "implied reservation" doctrine, Congress can reserve a federal water right independently of state law, to the extent consistent with its powers under the Commerce and Property Clauses of the U. S. Constitution. In enacting the Reclamation Act of 1902, Congress did not reserve a federal water right. Rather, in enacting section 8, it required the Bureau of Reclamation to acquire its water rights under state law. The United States concedes that the Bureau lacks a reserved water right. Since it lacks a reserved right, it must acquire its water rights under state law, in the same manner as private appropriators.

The lower court, in holding that the Bureau must comply with the "forms" but not the "substance" of the states' appropriation laws, created a new water right, one that is a hybrid of a reserved right and an appropriative right. However, since section 8 specifically provides for state "control" of "use" and "distribution" of water, it clearly requires federal compliance with the "substance" of state laws, and thus does not create a new, hybrid water right.

III

In *Nebraska v. Wyoming*, 295 U.S. 40 (1935), and *Nebraska v. Wyoming*, 325 U.S. 589 (1945), this Court held that section 8 requires federal agencies to acquire their water rights under state law, and provides for state control of impoundments and releases of water under the Reclamation Act of 1902. In *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958), and *City of Fresno v. California*, 372 U.S. 627 (1963), this Court held that section 8 does not give the states absolute control of water, and that the states may not interfere with specific, fundamental reclamation laws and policies established by Congress. The *Ivanhoe* and *City of Fresno* analysis, applied in this case, suggests that section 8 should be interpreted as requiring the Bureau to comply with conditions imposed by the state, to the extent that such conditions are not inconsistent with the purposes of Congress' reclamation projects. This approach protects the federal interest in reclamation, by insuring that the states cannot impair that interest. It protects the state interest, by authorizing the states to control federal water appropriations to the extent not inconsistent with overriding national objectives.

IV

The conditions of Decision 1422 are not inconsistent with the purposes of the New Melones Project. The congressional act authorizing the project incorporated the federal reclamation laws, which provide that a water right must be consistent with the "beneficial use" of water. The State Board made factual findings, in a proceeding in which the Bureau was a party, that the Bureau had failed to show that its proposed water uses are consistent with the "beneficial use" of water. Since the Bureau failed to seek man-

damus review of the decision, the findings are now final. Thus, the doctrine of collateral estoppel bars the United States from now attacking the findings, and the United States so conceded below.

V

Assuming *arguendo* that section 8 does not require the Bureau to comply with the states' appropriation laws, the Bureau must nonetheless fully comply with such laws when it elects to acquire its water rights under state law. The Bureau obtains an important benefit by acquiring its rights under state law, in that it obtains a recognition and quantification of its water rights without subjecting itself to a general stream adjudication. If the Bureau elects to obtain this benefit under state law, it must also comply with the burdens which the state attaches to the benefit.

VI

Assuming *arguendo* that section 8 does not require the Bureau to comply with the states' appropriation laws, the Bureau must nonetheless fully comply with such laws when it elects to obtain an assignment of state-held water rights. In this case, the state-held rights are based on applications filed by a State agency, and assigned to the Bureau subject to the State Board's approval. The state-held rights constitute a property right of the State. If the Bureau elects to obtain this property right, it is bound, constitutionally, statutorily and equitably, to comply with the conditions which the state attaches to the right.

ARGUMENT

INTRODUCTION

This case raises the question whether the Bureau, in acquiring and using unappropriated water under the Reclamation Act of 1902, must comply with the states' appropriation laws. The primary question is not whether Congress has constitutional authority to exempt the Bureau from the states' laws. Rather, it is whether Congress has chosen to exempt the Bureau from such laws. Thus, the primary question is not what Congress can do, but what Congress has done.

We shall see that Congress, in enacting section 8 of the Reclamation Act of 1902, required the Bureau to comply with the states' appropriation laws. Its goal was to provide for state control of the appropriation and distribution of water under the act. It achieved that goal by requiring the Bureau to be treated as an appropriator under the states' laws. No other conclusion is possible from the language, legislative history, surrounding historical circumstances and administrative interpretation of section 8. The reason that Congress provided for state control is that water under the 1902 act, although developed by federal projects, is ultimately distributed to local economic and municipal entities, and thus affects vital state interests.

The lower court held that, under section 8, the Bureau has absolute control of the use and distribution of water under the act. Its decision, by depriving the states of any control of water that is ultimately used by non-federal interests, mutes the states' voice in matters that affect their destiny. The lower court was apparently fearful that the states, if allowed to control federal water rights, might be able to impair Congress' reclamation objectives. However,

a proper interpretation of section 8 allows the states to control federal water rights only to the extent not inconsistent with Congress' reclamation objectives, and thus removes any basis for a fear that national interests will be overridden by state interests. Moreover, the states have historically controlled federal water rights under the 1902 act, as the Bureau has in fact complied with state law in acquiring and using unappropriated water under the act; rather than impairing federal reclamation interests, the states have accommodated such interests by granting preferential treatment to federal water rights. Thus, the states have neither the power nor the inclination to interfere with overriding national goals in the field of reclamation.

I. SECTION 8 OF THE RECLAMATION ACT OF 1902, VIEWED IN LIGHT OF ITS LANGUAGE, LEGISLATIVE HISTORY, SURROUNDING HISTORICAL CIRCUMSTANCES AND ADMINISTRATIVE INTERPRETATION AND PRACTICE, PROVIDES FOR STATE CONTROL OF APPROPRIATION AND DISTRIBUTION OF WATER UNDER THE ACT.

Early in this century, Congress turned its attention to the task of reclaiming the newly-settled lands of the American West. Since nature had deprived the lands of a plentiful water supply, a major reclamation effort was necessary to make the lands productive and habitable. Congress decided to undertake reclamation on a national level, by enacting the Reclamation Act of 1902, 32 Stat. 388 (1902), as amended 43 U.S.C. §§ 371 *et seq.* The act provides for federal construction and operation of reclamation facilities that will divert and store waters for distribution to farms, communities and industries in the western states.

Section 8 of the act describes the manner in which the Secretary of the Interior, who is to operate the projects, must comply with state water laws. It provides:

"That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the *laws of any State* or Territory relating to the *control, appropriation, use, or distribution of water* used in irrigation, or any vested rights acquired thereunder, and the *Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws,* and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and *beneficial use* shall be the basis, the measure, and the limit of the right." 32 Stat. 388, 390 (1902), 43 U.S.C. §§ 372, 383 (1970). (Emphasis added.)[13]

A. SIMPLE, PLAIN MEANING OF SECTION 8.

The meaning of section 8 is clear on its face. It requires the Secretary of the Interior, in carrying out his responsibilities under the 1902 act, to "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water. Thus, the section requires the Secretary to acquire his water rights under the states' "appropriation" laws, and subjects his rights to state "control" of the "use" and "distribution" of water. Rather than authorizing the secretary to acquire his water rights independently of state law, the section treats the Secretary as an appropriator under the states' appropriation laws, by requiring him to obtain his water rights in the same manner as

13. Although § 8 pertains only to water for "irrigation," it is made applicable to other purposes of multi-purpose projects by the usual congressional directive that the project is to be operated "pursuant to the Federal reclamation laws," a directive found in the act authorizing the New Melones Project. 76 Stat. 1191 (1962).

other appropriators. In this way, the section provides for state control of appropriation and distribution of water developed under the act.[14]

The lower court properly held that section 8 requires the Secretary to acquire his water rights under the states' appropriation laws. However, the court held that the Secretary need only comply with the "forms," not the "substance," of such laws. Nothing in section 8 supports the court's distinction between the "forms" and "substance" of the states' appropriation laws. In fact, the words "form" and "substance" do not even appear in the section. The distinction between "form" and "substance" is the product of the lower court, not of Congress.

B. LEGISLATIVE HISTORY OF SECTION 8.

The simple, plain meaning of section 8, that the states are to control the appropriation and distribution of water under the 1902 act, appears even more clearly from the legislative history of the section.

14. This conclusion is supported by other language in § 8. The section provides that the right to use water under the act exists only to the extent that the water is put to a "beneficial use." As will be discussed later, the "beneficial use" concept is the central feature of the states' appropriation laws, in that an appropriative right exists under state law only to the extent that the state determines that the appropriator will put the water to a "beneficial use." See pages 31-33, *infra*. The "beneficial use" concept has no other significance under federal law, as the federal government does not grant appropriative rights and hence does not determine the "beneficial use" of water. In fact, the "beneficial use" provision was inserted in § 8 because Congress wanted to insure a "perfection and uniformity" of state water laws. H.R. Rep. No. 1468, 57th Cong., 1st Sess. 7-8 (1902); 35 Cong. Rec. 6679, 57th Cong., 1st Sess. (1902) (Cong. Mondell). Thus, the section contemplates that the states will determine, as they do with other appropriators, whether the Secretary's water uses are consistent with the "beneficial use" of water, and will thereby determine the extent to which the federal right exists.

1. Construction and Operation of Projects.

In passing the 1902 act, Congress was primarily concerned with whether the projects should be built and operated by the federal government, or by the states. In answering this question, Congress focused on whether reclamation was primarily a national or local function. Those who opposed the act's passage, all from states which received no direct benefits from the act, argued that reclamation was a local function that should be undertaken by the states themselves; the federal contribution, at most, should be limited to ceding lands to the western states for this purpose. See 35 Cong. Rec. 6682 (Cong. Ray), 6731-6732 (Cong. Robinson). See generally *id.* at 6673 (Cong. Shafroth), 6673 (Cong. Newlands), 6702-6707 (Cong. Lanham), 6737 (Cong. Dalzell).[15] However, those who supported the act's passage, particularly representatives from the western states that stood to benefit most from the act, argued that reclamation was a national function, in the sense that the projects should be built by the federal government. *Id.* at 6706, 6676 (Cong. Mondell), 6673, 6734 (Cong. Newlands), 6673 (Cong. Shafroth), 6740 (Cong. Reeder), 6775 (speech of President Roosevelt); H.R. Rep. No. 1468, 57th Cong., 1st Sess. 3-4 (1902). The latter group argued that the western states lacked the financial capacity to build the projects, and thus that the reclamation effort would not succeed without a national

15. All references to the Congressional Record herein, unless otherwise indicated, are to proceedings of the 57th Congress, 1st Session, in 1902.

The view that lands should be ceded to the western states, so that they could undertake their own reclamation projects, was the basis of several reclamation bills unsuccessfully introduced in Congress prior to 1902. See, *e.g.*, H.R. 13846, 56th Cong., 2d Sess. (1901); H.R. 6790, 52d Cong., 1st Sess. (1892); Df. Ex. 6, pp. 62-66, 68, 81, 83-94.

undertaking. *Ibid.* The latter view prevailed, and Congress voted to provide for the construction and operation of the projects by the federal government, rather than by the states.

The lower court[16] relied on the above discussion for its conclusion that section 8 does not authorize the states to control federal water appropriations under the act.[17] The court failed to note that the discussion addressed only the question whether the federal government or the states should build and operate the projects, not whether the federal government or the states should control the appropriation and distribution of water developed by the projects. See note 17, *supra.* The court apparently assumed that, since the federal government was to build and operate the projects, it should control the appropriation and distribution of project water. This conclusion,

16. Since the appellate court largely endorsed the analysis provided by the district court, references herein to the lower court may include references to either the appellate court or the district court. Such references will be clarified, where appropriate, by references to the appendix.

17. The court rested its conclusion largely on its observation that "time and again during the Congressional debates, the supporters of the 1902 Act made clear the understanding that reclamation was a ***national*** project to be undertaken by the federal government." App. I, 62. (Emphasis in the original.) The court cited the statements of Congressmen Reeder and Newlands in support of that observation. App. I, 62-63; 35 Cong. Rec. 6734, 6740. However, the court failed to note that the statements of Reeder and Newlands were addressed to the question whether the federal government should build and operate the projects, not whether the federal government or the states should control the appropriation and distribution of project water. Congressman Reeder, according to the statement cited by the court, was merely providing an "answer" to those who claimed that the federal government "should not reclaim them [the public lands] itself, but should cede them to the States." App. I, 62; 35 Cong. Rec. 6740. Congressman Newlands merely advanced the same argument, stating, in the passage cited by the court, that "nothing can be accomplished by conveying this land to the States." App. I, 62; 35 Cong. Rec. 6734.

aside from the fact that it is a *non sequitur,* ignores the lengthy congressional discussion concerning the control of such water, which shall now be examined more fully.

2. Control of Appropriation and Distribution of Water.

In the next few pages, we will describe at length the congressional discussion relating to the control of water under the 1902 act. To summarize the discussion, those who opposed the act argued that, if the federal government is to build and operate the projects, it should control the appropriation and distribution of water developed by the projects; if reclamation is a national function for some purposes, it is a national function for others. Others, including the western representatives who drafted and most vigorously supported the act, argued that this control should rest with the western states, not with the federal government. This control should be exercised, they argued, by requiring federal authorities to obtain their water rights under the states' appropriation laws, just as private appropriators are required to do. They argued that the western states would be vitally affected by the use of such water, since such water is not to be consumed for normal federal purposes on federal lands; rather, it is to be consumed by non-federal, primarily agricultural, interests on non-federal lands. They pointed out that the western states had traditionally controlled the use of water by non-federal users, a tradition recognized by Congress in acts passed in 1866, 1870 and 1877; hence, they argued, the states should have the same control over water uses under the 1902 act. The proponents of state control prevailed. They succeeded in having section 8 included in the final reclamation bill, which requires the Secretary of the Interior to be treated as an appropriator under the states' appropriation laws.

a. The President's Position.

President Theodore Roosevelt was among the first to advocate passage of a national reclamation bill that would provide for state control of water. He expressed this position in his annual speech to Congress in 1901, stating:

> "Great storage works are necessary to equalize the flow of streams and to save the flood waters. Their construction has been conclusively shown to be an undertaking too vast for private effort. Nor can it best be accomplished by the individual States acting alone. Far-reaching interstate problems are involved; and the resources of single States would often be inadequate. It is properly a national function, in at least some of its features.
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> . . .
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> "These irrigation works should be built by the National Government. . . . *The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with those laws or with vested rights.* The policy of the National Government should be to aid irrigation in the several States and Territories in such manner as will enable the people in the local communities to help themselves, and as will stimulate needed reforms in the State laws and regulations governing irrigation." 35 Cong. Rec. 6775. (Emphasis added.)

b. The Senate Debate.

A similar theme was echoed during the Senate's consideration of the reclamation bill, S. 3057.[18] Senator Clark of Wyoming, the chief senatorial spokesman for the bill, spoke in favor of section 8 by disclaiming the notion that

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18. The Senate report stated that § 8 provides that "there is to be no interference with State or Territorial laws on the subject of irrigation." S. Rep. No. 254, 57th Cong., 1st Sess. 2 (1902).

"a great Government Bureau . . . shall have control of all the lands and waters in our arid regions." *Id.* at 2222. He further stated:

> "The question of conservation of waters is one of national importance; the question of reservoir sites and reservoir building is one that appeals to the Government as a matter of national import; but the question of State or Territorial control of waters after having been released from their bondage in the reservoirs which have been provided is a separate and distinct proposition. . . . *It is right that the General Government should control, should conserve, and should reservoir the head waters of these streams. In this it is a national and not a State proposition. But in the distribution of these waters . . . it is right and proper that the various States and Territories should control in the distribution.* The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another.
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> *"Every one of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution of this problem of irrigation in their individual localities.* To take from these experienced men, to take from the legislatures of the various States and Territories, the control of this question at the present time would be something little less than suicidal. *They are the men qualified to deal with the question,* the laws written upon their statute books and read of all men, and in everyone of these States and Territories the laws have been passed that most diligently regard the rights of the settler and of the farmer...." *Ibid.* (Emphasis added.)[19]

19. The lower court acknowledged that section 8, as passed by the Senate, contained a "strong States' rights provision." App. I, 59. However, the court stated that its meaning was changed by an amendment prior to House consideration of the bill. *Ibid.* In fact, the amendment was merely intended to prevent upstream states from inhibiting the flow of interstate waters to users in downstream states, and, since the waters of the CVP are wholly intrastate, the amendment has no effect on the CVP. A thorough analysis of the amendment, which is too lengthy to be appropriately included in the body of our brief, appears in an appendix at the end of this brief.

c. The House Debate.

The major spokesman for the bill in the House was Congressman Mondell of Wyoming. After arguing that the reclamation effort "can only be undertaken and accomplished by the National Government," 35 Cong. Rec. 6676, Mondell pointed out that the bill required the Secretary of the Interior to acquire his water rights under state law. He stated:

> "I can perhaps best illustrate . . . [the bill's] workings by indicating how the Secretary of the Interior as the agent of the Government under this act, would proceed. . . . It having been ascertained that a sufficient supply of water for the irrigation of the lands in question was available and unappropriated and the feasibility of a project having been determined, *the Secretary of the Interior would proceed to make the appropriation of the necessary water by giving the notice and complying with the forms of law of the State or Territory in which the works were located.*" *Ibid.* (Emphasis added.)

Mondell's statement clearly shows that, under section 8, federal officials must acquire their water rights under the states' appropriation laws. However, the lower court suggested that the "forms" of the states' laws, as mentioned by Mondell, might be something different from the "substance" of their laws; his statement can thus be construed, the court stated, as exempting federal officials from the obligation to comply with the "substance" of state laws.

Ibid. The court concluded that the conditions attached to federal water rights are the "substance" of the states' laws, and thus that the Bureau need not comply with the conditions. *Ibid.*[20] However, Mondell and other congressmen made other remarks that indicate that no distinction was intended between "form" and "substance." These additional remarks, which shall now be described, were wholly ignored by the lower court.

Mondell stated that section 8, beyond requiring the Secretary to acquire his water rights under state law, would allow the states to control the use and distribution of water under the act. He described the section's effect by quoting with approval the Republican political platform of 1900, to the effect that:

> "In further pursuance of the constant policy of the Republican party to provide free homes on the public domain, we recommend adequate national legislation to reclaim the arid lands of the United States, reserving *control* of the *distribution* of water for irrigation to the respective States and Territories." 35 Cong. Rec. 5676. (Emphasis added.)[21]

He also quoted with approval the statement of President Roosevelt in his 1901 congressional message, to the effect that:

> "These irrigation works should be built by the National Government, [but] *the distribution of the water,*

20. The district court stated that the Secretary "must" follow the "forms" of state law as a matter of "comity," App. I, 68-69, 96, ignoring the fact that one cannot be required to do that which he does as a matter of "comity." The appellate court stated that the Secretary is *required* to follow this procedure under § 8. and that he does not do so as a matter of comity. App. I, 34.

21. Many other congressmen cited the passage in the Republican Platform as explaining the meaning of section 8. See 35 Cong. Rec. 6672, 6673 (Cong. Shafroth), 6748 (Cong. Glenn), 6752 (Cong. Jones), 6743 (Cong. Mercer).

> *the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws,* and without interference with those laws or with vested rights." *Id.* at 6677. (Emphasis added.)

Mondell proposed a motto of "national expenditure, local administration" for the bill. *Ibid.* He further stated:

> "Section 8 follows the well-established precedent in national legislation of recognizing local and State laws relative to the *appropriation and distribution* of water, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to these laws." *Id.* at 6678. (Emphasis added.)

Mondell stressed that section 8, in allowing the western states to control the appropriation and distribution of water under the 1902 act, would continue the tradition of state control which Congress had recognized and approved by the passage of the Mining Acts of 1866 and 1870, and the Desert Land Act of 1877.[22] Mondell stated:

> "Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the *appropriation and distribution* of water used in irrigation, and it has been deemed wise to continue our policy in this regard." *Id.* at 6679. (Emphasis added.)

In response to a question on "the subject of national or State control," he stated:

> "Now, as to *State control over appropriation and distribution* of water, I will say to the gentleman that there is no reasonable ground for disagreement on that point. We began to legislate in regard to the use of water in irrigation in 1866. We have legislated continuously along one line. The President in his

22. The Mining Acts of 1866 and 1870 and the Desert Land Act of 1877 are discussed more fully at pages 32-33, *infra.*

message declared in conformity with all the legislation which had preceded. The Republican platform declared in conformity with that legislation." *Ibid.* (Emphasis added.)

He stressed that section 8 was consistent with the "acts of 1866, 1870 and 1877" in "recognizing the *control* of the States over the *use* of waters within their borders." *Ibid.* (Emphasis added.) Thus, Mondell could not have expressed more clearly the view that the states are to control the appropriation and distribution of water under the 1902 act, just as they had traditionally controlled the appropriation and distribution of water under the 1866, 1870 and 1877 acts.

Other supporters of the bill, whose voices were also ignored by the lower court, spoke in a similar vein. Congressman Sutherland stated:

"But it is said, further, that the laws of the State or Territory relating to the control, appropriation, and use of the water are not to be interfered with, and this will result in still further confusion. The confusion is in the mind of the objector and not in the bill. No more confusion will result from the *use* of these waters under the *local laws and regulations of the State* than have resulted by the use of other waters or property.

. . .

"The fact that the title to a lake is in the public, the title and ownership and control of the canals leading from it is in the proprietors of the water, and that *the appropriation and use of the water is under the State law* has never resulted in any sort of confusion. On the contrary, if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail. The full domination and complete ownership of a tract of land is in no manner injuriously affected, because its title must be acquired and

disposed of and it must be occupied and held under and in accordance with the law of the State." *Id.* at 6770. (Emphasis added.)

Congressman Burkett, another supporter of the bill, stated:

"I might say in passing, for the benefit of those who are unfamiliar with the real origin of this particular bill . . . that it is the *compromise* of contending opinions upon the questions. It is the bill of the united West. It perhaps is not exactly anyone's bill. It goes further than some would have gone in some particulars, and on the other hand falls very far short of where others would have it go in other particulars. . . . The Government probably could not undertake to distribute the water to the user, for conditions of water use will vary in different localities. The law that would be appropriate in one community or in one State might not be adequate in another condition. *Distribution should be . . . regulated and controlled by State laws and by State boards of engineers.*" *Id.* at 6728. (Emphasis added.)

Another of the bill's proponents, Congressman Martin, argued in favor of the bill's constitutionality by asking:

"Why cannot the Government, merely as a landowner within the State, do the same as an individual—reclaim its own lands by irrigation projects *under State laws?*" 35 Cong. Rec. 6760. (Emphasis added.)

Thus, it was clearly understood, both in the Senate and the House, that section 8 would not only require the Secretary to acquire his water rights under state law, but would also enable the western states to control the use and distribution of water under the 1902 act. No member of Congress, even among those who opposed the section, offered a different interpretation. No one suggested that the Secre-

tary was free to ignore the "substance" of the states' appropriation laws.

The congressional supporters of section 8, many of whom hailed from the western states, believed that they were preserving broad authority to the states to decide how their waters should be used under the act. This was a matter of importance to the states, since the water was to be used by non-federal interests whose activities affect the economic growth and development of the states. The lower court, by its facile distinction between the "form" and "substance" of the states' laws, has nullified virtually everything that these congressmen meant to accomplish. This distinction limits the states to the ministerial function of granting the federal water right once it is mathematically calculated that unappropriated water is available for the project; it divests the states of discretion to control the allocation of water to the non-federal users who are the ultimate recipients of the water, no matter how much such allocations may affect state interests. In a word, the court's decision provides for absolute federal control of the use and distribution of water under the act. This is, of course, the result that was urged by the congressional opponents of section 8, and that was opposed by the congressional supporters of the section. Thus, the lower court, by exempting the Bureau from the "substance" of the states' appropriation laws, has reached a result opposite to that intended by Congress. It has undertaken to re-write history, by substituting its own reclamation philosophy for that of Congress. If the accommodation between federal and state interests worked out by Congress is to be changed, such is the task of Congress, not the courts. As this Court has stated in construing federal statutes, "our task here is a narrow one," for "we cannot

remake history." *DeCoteau v. District Court*, 420 U.S. 425, 449 (1975).

C. HISTORICAL CIRCUMSTANCES SURROUNDING ENACTMENT OF SECTION 8.

In order to understand why Congress chose to provide for state rather than federal control of water under the 1902 act, it is helpful to understand the historical tradition that recognizes the states as the source of water rights in the West, a tradition recognized by Congress in the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877.

The common law doctrine of riparian rights, which entitles a landowner to the use of water appurtenant to his land, is the historical basis of water law in the eastern states. However, the discovery of gold in California triggered a chain of events that led to the development of a new water law in the western states, the doctrine of prior appropriation. Under this doctrine, the first person to put water to a beneficial use has a prior right to the use of the water, as long as the beneficial use continues. This doctrine evolved from the customs of the early mining camps, where the first miner to divert water to his claim was recognized as having prior rights as against miners who appeared later on the scene. This custom was soon recognized by local courts. The appropriation doctrine was well-suited to the settlers who arrived in the West, for it provided the most efficient use of the West's sparse waters; it was rooted in simple necessity, not abstract theory. The doctrine has been adopted by all western states, and is the foundation of modern western water law. See generally *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-750 (1950); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142,

153-157 (1935); *Jennison v. Kirk*, 98 U.S. 453, 456-461 (1878).

Early court decisions held that the water rights of California's miners, which were based on local law and custom, might be subject to the paramount rights of the United States, since the United States acquired original ownership of the waters of California as a result of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848). See *Irwin v. Phillips,* 5 Cal. 140 (1885). Accordingly, it was feared that the miners' rights might be inferior to the rights acquired by settlers under federal laws, such as the Homestead Act, 12 Stat. 392 (1862). To resolve these doubts, Congress passed the Mining Act of 1866, 14 Stat. 251, 253, as amended in 1870, 16 Stat. 217, 218, which protected the miners' claims to the extent that they were based on "local customs, laws, and the decisions of the courts." *California Oregon Power Co. v. Beaver Portland Cement Co., supra* at 153-157. Congress later enacted the Desert Land Act of 1877, 19 Stat. 377, to provide lands to anyone willing to settle on the arid lands of the West. The latter act provided that the settlers' water rights "shall depend upon bona fide prior appropriation," and that surplus waters not acquired by the settlers are "free for the appropriation and use of the public...." *Ibid.* In *California Oregon Power Co. v. Beaver Portland Cement Co., supra,* this Court held that the 1877 act, if not the 1866 and 1870 acts, "severed" the waters from the lands of the public domain, and thus required all water users, whether claiming under federal laws or not, to acquire their water rights in the western states under the states' appropriation laws. *Id.* at 158-162.[23] The decision

23. The Court stated:

"What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." 295 U.S. at 163-164.

thus recognized the states' appropriation laws as the source of water rights in the West. See generally *California Oregon Power Co. v. Beaver Portland Cement Co., supra; Ickes v. Fox*, 300 U.S. 82, 95 (1937).

With increasing demands upon the limited waters of the western states, the states became conscious of the need to regulate the allocation of water among competing users, rather than merely recognize water rights based on priority of use. Wyoming adopted a permit system in 1891, under which an appropriator is required to obtain a permit from State authorities as a condition of his appropriative right; the permit could not be issued if Wyoming authorities deemed the proposed use to be "detrimental to the public interest." 2 Wiel, *Water Rights in the Western States* 1551, 1557-1558 (3d ed. 1911).[24] Most other western states, following the Wyoming example, also adopted permit systems.[25]

24. The Department of the Interior noted that, contemporaneously with the passage of the Reclamation Act of 1902, the states of Idaho, Nevada and Utah had also adopted permit systems under which "an application must be made to the State engineer for permission to make an appropriation." U.S. Dept. of the Interior, *Proceedings of Second Conference of Engineers of the Reclamation Service* 223-224 (1905) (App. II, 120-122).

Moreover, many states that lacked permit systems in 1902 nonetheless had statutory schemes that provided for at least partial control of water allocations. For instance, California, which did not adopt a permit system until 1914, Cal. Wat. Code § 1202, had developed a statutory scheme in the 1850's for the allocation of water among competing mining and agricultural interests. Hutchins, *California Law of Water Rights* 47-48 (1956 ed.).

25. Of the nineteen western states, all but three require an appropriator of surface water to obtain an appropriative permit from the state. I Hutchins, *Water Rights Laws in the Nineteen Western States* 302 (1971). The exceptions are Hawaii, Colorado and Mon-

Thus, the permit system is the essence of the appropriation laws of most western states. As the western states control the acquisition and use of water, the permit system is the mechanism by which this control is exercised.

The lower court concluded that Congress did not have California's permit system in mind in enacting section 8 in 1902, since California's permit system was not adopted until 1914. App. I, 32-33. This conclusion is a *non sequitur*. It ignores the fact that other states subject to the 1902 act, following Wyoming's example, adopted permit systems *prior* to 1902. Since some states had adopted permit systems prior to 1902, it is irrelevant, in interpreting section 8, that other states had not. The court's logic would carry it to the absurd result that Congress meant for federal agencies to comply with permit systems in some states but not others, depending on whether the permit system was adopted prior to 1902.[26] In any event, Congress adopted a supplementary reclamation law in 1956 that reaffirms the Bureau's obligation to "proceed in conformity with" state laws relating

tana. *Ibid.* Hawaii, which is not an arid state, does not recognize the appropriation doctrine. *Ibid.* Colorado provides a system of statutory adjudication for the acquisition of appropriative rights, rather than an administrative system. *Ibid.* Montana provides for the acquisition of appropriative rights by either statutory adjudication or by posting of notice and filing of records. *Ibid.*

26. In fact, the congressional report accompanying the 1902 act noted that § 8 would "encourage" the western states to adopt more "perfect and uniform" water laws. H. R. Rep. No. 1468, 57th Cong., 1st Sess. 7 (1902). See also 35 Cong. Rec. 6679 (Cong. Mondell). Similarly, the Reclamation Service, the Bureau's predecessor, expressed the view in 1902 that its reclamation function would be advanced by the adoption of more "uniform systems of laws in the various States. . . ." U. S. Dept. of the Interior, *Third Annual Report of the Reclamation Service*, 1903-04 (2d ed.) 31-32 (1905) (App. II, 126). Thus, the western states, in developing nearly-uniform permit systems to replace their antiquated water laws, did exactly what Congress and the executive branch encouraged them to do.

to the "control, appropriation, use, or distribution" of water under the 1902 act. Section 4, Reclamation Project Act of 1939, as amended, 70 Stat. 484 (1956), 43 U.S.C. § 485h-4 (1970).[27] Since the statute was enacted after California adopted its permit system in 1914, the statute clearly and unambiguously requires the Bureau to comply with California's permit system, assuming *arguendo* that section 8 does not.

Thus, the western states traditionally controlled the acquisition and use of water by non-federal users, a tradition recognized by Congress in the acts of 1866, 1870 and 1877. Since water under the 1902 act is also distributed to non-federal users, Congress continued the tradition of state control with respect to water under that act. In this way, Congress achieved an historical continuity in the control of the West's water, thus avoiding a departure from past traditions rooted in the history of the West.

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27. On other occasions, Congress has reaffirmed the principle of state control found in § 8. For instance, the Flood Control Act of 1944, which authorizes the New Melones Project, provides that it is the "policy of Congress to recognize the interest and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." 58 Stat. 887-888, 889 (1944).

In enacting the McCarran Amendment, 43 U.S.C. § 666(a), which subjects the United States to general stream adjudications in state courts, Congress described the effect of § 8 thusly:

> "In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary controls thereof. . . .
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> "Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951).

D. ADMINISTRATIVE PRACTICE UNDER, AND INTERPRETATION OF, SECTION 8.

The administrative practice of federal agencies under the 1902 act shows that Congress was successful in its effort to provide for state control of water. Federal agencies have consistently complied with the states' appropriation laws, including their permit systems, in acquiring and using unappropriated water under the act. See Df. Ex. 1 (App. II, 1-4); Df. Ex. 9, 9(a), 9(b) (R. 407-415, 512-518); "Federal-State Water Rights," Hearings on S. 1275 before Subcommittee on Irrigation & Reclamation, Sen. Comm. on Int. & Ins. Affairs, 88th Cong., 2d Sess. 320, 322, 323 (1964) (R. 490-503); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 735 n. 9, 740 n. 14 (1950). In California, the Bureau has acquired 41 appropriative permits since 1938, and, until this case, has consistently complied with conditions in the permits; in fact, it has never acquired unappropriated water in California except pursuant to the permit process. Df. Ex. 1 (App. II, 1-4). It has modified its permit applications in another state, after the state determined that the proposed federal uses were not in the public interest. See Trelease, "Reclamation Water Rights," 32 *Rocky Mtn. L. Rev.* 464, 468 (1960). The significance of this administrative conduct, of course, arises from the rule of statutory construction that requires great weight to be given to the manner in which a statute is interpreted and applied by the agency charged with its enforcement. See, *e.g., Zemel v. Rusk,* 381 U.S. 1 (1965); *Perkins v. Matthews,* 400 U.S. 379, 391 (1970).

The district court stated that the administrative practice of the Bureau could be construed as supporting the United States' view that the Bureau acquires its water rights under state law as a matter of "comity." App. I, 88-89.

It is perhaps remarkable that an unbroken pattern of administrative conduct, spanning three-quarters of a century, could be attributed to administrative courtesy rather than legislative direction. In any event, the court's view is inconsistent with statements made by federal reclamation officials in interpreting their obligation under section 8, as shall now be seen.

Shortly after the 1902 act was passed, the Reclamation Service, the Bureau's predecessor, noted:

> "In order to carry out the provisions of this section [section 8], careful study must be made of the effect of State laws upon each project under consideration in that particular State. It appears probable that in some of the States radical changes in the laws must be made before important projects can be undertaken." H.R. Doc. No. 44, 58th Cong., 2d Sess. 33 (1904) (App. II, 125).[28]

The Reclamation Service then conducted a survey of the appropriation laws of the western states, and noted that "an application must be made to the State engineer for permission to make an appropriation" in those states, Idaho, Nevada, Utah and Wyoming, which had adopted permit systems. U.S. Dept. of the Interior, *Proceedings of Second Conference of Engineers of the Reclamation Service* 223-225 (1905) (App. II, 120-123). Later, it noted:

> "It is very important to secure as nearly a uniform system of laws in the various States as may be consistent with the different physical conditions, and it is believed that as time goes on the State laws will be brought into greater harmony with one another and with the necessities of irrigation development." H.R.

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28. As will be seen, many western states have in fact made such changes in their appropriation laws, by affording preferences to federal water rights under the 1902 act. See note 45, *infra.*

Doc. No. 28, 58th Cong., 3d Sess. 32 (1905) (App. II, 126).

Similar statements were made in later decades. In 1948, the Bureau advised Congress, in relation to the CVP, that "reclamation law . . . recognizes State water law and rights thereunder," and that "Bureau filings are subject to State approval." 95 Cong. Rec. A961, 81st Cong., 2d Sess. (1948). In 1952, the Secretary of the Interior notified California's Governor Earl Warren that "the rights of the United States to store, divert, and use water under California law . . . have their inception in certain applications by the California Director of Finance to appropriate unappropriated water, which have been or are to be assigned by him to the United States, [and] in certain applications made by the United States itself." H.R. Doc. No. 416, 84th Cong., 2d Sess. 810-812 (1956). [29]

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29. In 1950, Congress received a memorandum from the Commissioner of Reclamation, a copy of which was also submitted to this Court for its deliberations in the *Gerlach* case. The memorandum stated:

> "Whatever the correct theory be as to ownership of unappropriated water, the net effect as regards State laws is the same so far as the Bureau of Reclamation and its activities are concerned. This is true because of section 8 of the 1902 act. The Bureau of Reclamation and the Secretary of the Interior are required by that law to proceed in conformity with State water laws; they do so proceed; and they would strenuously oppose any change in the Federal law which now requires them to proceed in conformity with State water laws.
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> • • •
>
> "Should the United States, in connection with the development of the Central Valley Project, as now or as it may be in the future authorized, desire to obtain or develop additional water supply for the project, it is and will be the intention and the clear policy of the Bureau of Reclamation and the Secretary of the Interior to obtain or develop the additional water supply by proceeding in conformity with the State law." "Federal-State Water Rights," Hearings on S. 1275 before Subcommittee on Irrigation & Reclamation, Senate Comm. on Int. & Ins. Affairs, 88th Cong., 2d Sess. 322, 323 (1964) (R. 490.)

The Bureau's own operating instructions, currently in effect, recognize its obligation to comply with state law. Its instructions provide:

> "State and Federal law and policy establish the framework of project formulation. Project plans must comply with State legal provisions or priorities for beneficial use of water. . . . In some cases, . . . State laws . . . have been modified to meet specific conditions in the authorization of particular projects.
>
> • • •
>
> *"The Reclamation Act recognizes the interests and rights of the States in the utilization and control of their water resources* and requires the Bureau, in carrying out provisions of the Act, to proceed in conformity with State water laws. Since the construction of a reservoir and the subsequent storage and release of water for beneficial purposes normally entails stream regulation, *it is necessary to reach an understanding with the States regarding reservoir operating limitations.*" U. S. Bureau of Reclamation, Dept. of the Interior, "Reclamation Instructions," §§ 116.3.1, 231.5.1. (Emphasis added.)

Perhaps the clearest statement of the historic federal position was expressed by the Commissioner of Reclamation in 1975:

> "We recognize that the ultimate right to store, divert, and utilize water in accordance with applications made pursuant to State law is one of the key elements of past, present, and future development in the West. *Each state has the duty to determine under its own statutes how its unappropriated water is to be used.* Since 1902, the Bureau has consistently taken the position that it will obtain under State law its rights to store and divert water for its projects recommended

for Congressional authorization." Df. Ex. 13, p. 4 (App. II, 105). (Emphasis added.)[30]

The lower court, by providing for federal rather than state control of water under the 1902 act, has thus altered several decades of settled administrative practice. It has freed the Bureau of conditions which the western states, in exhaustive hearings extending over many decades, have developed in order to insure the best possible use of water from federal reclamation projects, thereby nullifying an extraordinary amount of planning effort which the states have undertaken at the Bureau's own request. It has thus undermined the historic relationship that has guided federal and state agencies in the field of reclamation since 1902. We do not ask this Court to establish a new, untested relationship between these entities. Rather, we ask that the historic, proven relationship be continued.

II. THE BUREAU OF RECLAMATION LACKS A RESERVED WATER RIGHT WITH RESPECT TO THE NEW MELONES PROJECT, AND HENCE MUST COMPLY WITH CALIFORNIA'S APPROPRIATION LAWS.

We noted earlier that the western states traditionally controlled the acquisition and use of water. See pages 31-35, *supra*. Their control is subject to two overriding constitutional limitations, as recognized by this Court. First, it is limited by Congress' powers, under the Commerce Clause, to reserve water for the purpose of promoting the navigability of navigable waters. U. S. Const., Art. I, § 8; *Kansas v. Colorado*, 206 U.S. 46, 86 (1907); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). Second, it is limited by Congress' powers, under the Property Clause, to reserve water for use on federal lands withdrawn from the public domain. U.S. Const., Art. IV, § 3; *Kansas v. Colorado, supra* at 86; *Cappaert v. United States*, 426 U.S. 128, 138-142 (1976); *Arizona v. California*, 373 U.S. 546, 599-600 (1963); *United States v. District Court*, 401 U.S. 419 (1971). Thus, Congress has constitutional authority to reserve a federal water right independently of state law, to the extent consistent with its commerce and property powers. The courts have fashioned a presumption that, where Congress has not spoken otherwise, Congress impliedly intends to reserve water sufficient to serve the purposes of federal lands withdrawn from the public domain, a presumption known as the "implied reservation" doctrine. See *Cappaert v. United States, supra* at 138-142.

A. ABSENCE OF A FEDERAL RESERVED RIGHT.

Section 8 overcomes any presumption that Congress intended to create a federal reserved water right under the Reclamation Act of 1902. That section, viewed in light of its language and legislative history, indicates that Congress intended for federal authorities to acquire their water rights under state law, and intended for the states to control the acquisition and use of water under the act. Thus, the "implied reservation" doctrine is not applicable in the field of reclamation.[31] In fact, this Court has held that "it

30. The Commissioner's statement claims, however, that the States "cannot unilaterally dictate daily operations of the Federal facilities nor unilaterally dictate future changes in authorized uses." *Ibid.* We do not assert the right, of course, to "dictate" the daily operation of a project or changes in authorized uses, except to the extent related to the "beneficial" and "reasonable" use of water and not inconsistent with specific federal reclamation laws or congressionally-authorized project purposes.

31. Even if the "implied reservation" doctrine is applicable in the field of reclamation, it is not applicable under the facts of this case. That doctrine is only applicable to water necessary to serve "lands withdrawn from the public domain." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). However, the lands on which the New Melones Project is being built were acquired by purchase and

is not proper to analogize" federal rights under the Reclamation Act of 1902 to federal reserved rights under the "implied reservation" doctrine. *Nebraska v. Wyoming*, 325 U.S. 589, 629 (1945); see *Ickes v. Fox*, 300 U.S. 82, 95 (1937).[32] As shall now be seen, there are two important considerations of public policy that, we believe, explain and justify Congress' decision to provide for state control of water.

1. Distribution of Water to Non-Federal Interests.

First, under the 1902 act, water is not used on federal lands for traditional federal purposes, as in those cases which have arisen under the "implied reservation" doctrine.[33] Rather, such water, after being diverted and stored by the federal government, is ultimately distributed to, and used by, non-federal users on non-federal lands; it is consumed by the farmers, industries, cities and villages that comprise the body politic of the state. The federal government is a conduit, not a consumer, of the water. *Ickes v. Fox*, 300 U.S. 82, 95 (1937). Hence, the federal

condemnation, not by withdrawal from the public domain. Df. Ex. 3(a), 3(b), 3(c), 3(d) (App. II, 43, 52, 60, 64).

Nor can the United States claim the right to reserve water for the CVP pursuant to its navigation powers under the Commerce Clause. This Court held, in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 731-742 (1950), that the CVP was authorized for purposes of reclamation, not navigation. Hence, the United States' navigation powers do not allow it to ignore California law in acquiring water for the CVP.

32. In *Kansas v. Colorado*, 206 U.S. 46, 92 (1907), the Court stated that "we do not mean that its [Congress'] legislation can override state laws in respect to the general subject of reclamation."

33. In the "implied reservation" cases decided by this Court, water was used by the federal government on lands set aside for national forests, national wildlife refuge areas, national recreation areas, Indian reservations, and so forth. See *e.g., Cappaert v. United States, supra; Arizona v. California, supra; United States v. District Court, supra.*

interest is less apparent than in those cases which have arisen under the "implied reservation" doctrine. Conversely, the state interest is proportionately greater. The states' economic and political development is strongly influenced by the use of water by non-federal interests, by its allocation among competing agricultural, municipal and industrial interests. Moreover, the western states traditionally controlled the allocation of water among such non-federal interests, a tradition recognized by Congress in the Desert Land Act and earlier acts. See pages 31-35, *supra*. In short, water uses under the 1902 act are more analogous to water uses traditionally controlled by the states, than to federal water uses under the "implied reservation" doctrine. This is, we believe, the main reason why Congress chose to provide for state rather than federal control of water under the act.

2. Qualification of the Federal Water Right.

Second, if the "implied reservation" doctrine were applicable in the field of reclamation, the western states would be unable to quantify the federal water right, and would thus be unable to effectively manage and allocate their waters even among non-federal users. This result would inject immeasurable confusion and uncertainty into western water law.

The states' appropriation laws, consisting of their permit systems, not only provide a method for the states to control water allocations; they also provide a method for the states to administratively quantify the amount of unappropriated water that should be granted to an applicant, and thus to quantify the amount of unappropriated water that remains available for use by others. However, if the Bureau need not acquire its water rights under state laws, the states would

be unable to administratively quantify the amount of unappropriated water taken by the Bureau. In the present case, for example, the State Board would be unable to determine the rate at which the Bureau can lawfully divert water for the New Melones Project, the seasons during which the diversions can be made, and so forth. The only other method for quantifying the federal right would be by adjudicating such rights in relation to those of competing users, a process that is inordinately unwieldy and protracted.[34] The states would thus lack a ready, efficient method for quantifying the amount of unappropriated water that is available for non-federal users, and thus would not know whether to grant or deny the applications of such users.[35] Moreover, non-federal users who have already acquired appropriative rights under state law would lack assurance that the Bureau might not subsequently claim the water necessary to satisfy their rights, on grounds that the Bureau acquired senior rights to an unquantified amount of water under the "implied reservation" doctrine.

34. See, *e.g.*, *Arizona v. California*, 373 U.S. 546 (1963). For example, the United States brought an action against thousands of competing users in 1913 to quantify its water rights in the Truckee River in Nevada; the proceeding was not completed until 1944, more than three decades later. See *United States v. Orr Water Ditch Co., et al.*, Equity No. A-3 (D. Nev. 1944).

35. For example, the Bureau holds appropriative permits, based on its own applications, that entitle it to appropriate 6,100,000 acre-feet of water for the CVP. Memorandum, "Water Supply and Water Rights Data," *Governor's Commission to Review California's Water Rights Law*, 3, 6 (August 4, 1977); see Df. Ex. 9(a) (R. 512-519). It holds other appropriative permits, based on applications assigned to the Bureau by California's Department of Finance, that entitle it to appropriate an additional 9,178,000 acre-feet of water for the CVP. *Ibid.* If the Bureau acquired its water rights independently of California's permit system, California would not know the precise amount of water allocated to the Bureau, and hence would not know the amount of unappropriated water available for others.

Thus, if the Bureau were to acquire its water rights independently of state law, the western states' ability to manage and plan the use of their unappropriated waters would be impaired, and existing water rights threatened. This result has been historically avoided because the Bureau, under section 8, has acquired its water rights under state law.[36]

B. THE UNITED STATES' CONCESSION.

The United States, in its complaint, alleges that it need not acquire its water rights under state law, an allegation consistent with the argument that it acquires a reserved water right under the "implied reservation" doctrine. However, in its brief opposing our petition for writ of certiorari, the United States conceded that "the United States has not claimed any reserved rights in connection with the New Melones Project." Brief for the United States in Opposition, 11. If this is so, it is difficult to understand the basis for the United States' argument that it need not acquire its water rights under state law, and the United States has yet to spell out the basis of its argument.

36. Of course, the western states are unable to administratively quantify federal water rights that are based on the "implied reservation" doctrine. However, in cases where the "implied reservation" doctrine has been applied by this Court, the federal rights have only involved relatively small amounts of water, such as the amounts necessary to satisfy federal needs on forest lands, wildlife refuge areas, and so forth. See note 33, *supra*. Conversely, large amounts of water are necessary to meet the purposes of federal reclamation projects under the Reclamation Act of 1902; for instance, the amount of water delivered from such projects in 1974 totaled 29.7 million acre-feet, and served 17.6 million people, which is 31% of the population of the 17 western states. U. S. Bureau of Reclamation, Dept. of the Interior, *Water and Land Resource Accomplishments*, 1974: Summary Report, 2. Thus, the western states' ability to manage their water resources would be much more greatly impaired by their inability to quantify federal rights in the field of reclamation, than by their inability to quantify federal rights in the "implied reservation" cases heretofore decided by this Court.

Since the United States lacks a reserved right, it does not acquire its water rights independently of state law under the Commerce and Property Clauses. Thus, it must acquire its water rights in the same manner as private appropriators. This Court has held that private appropriators are fully subject to the states' appropriation laws. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). Thus, the United States is fully subject to California's water laws, at least with respect to the New Melones Project. By its concession, the United States has abandoned the sole legal theory that might justify the acquisition of a federal water right independently of state law, and that might sustain the lower decision.

C. THE LOWER COURT'S NEW WATER DOCTRINE.

The lower court held that the United States must acquire its water rights under state law, thus rejecting the United States' position that it acquires its rights independently of state law. Since the United States must acquire its water rights under state law, the logical consequence is that the United States must comply with the conditions which the states attach to the Bureau's water rights. The conditions are an inherent part of the water right; a water right constitutes a state's recognition that water will be put to a "beneficial use," and the conditions provide the basis for this recognition. However, the lower court avoided this logical conclusion. Instead, it ruled that the Bureau need not comply with the "substance" of the states' appropriation laws, and hence need not comply with conditions attached to the Bureau's water rights.

Perhaps unknowingly, the lower court developed a new, abberational body of water law, one that is without precedent in the history of western water law. Since the Bureau

must acquire its rights under state law, it does not acquire a reserved right. However, since the states cannot attach conditions to insure protection of the "beneficial use" of water, the Bureau does not acquire an appropriative right, at least the kind of appropriative right that other appropriators acquire. The lower decision thus results in a new water right, one that is a hybrid of a reserved right and an appropriative right.

Nothing in section 8 supports this new hybrid water right. The section requires the Bureau to comply with the states' appropriation laws, and makes no exception for the "substance" of the states' laws. To the contrary, the section specifically provides for state "control" of the "use" and "distribution" of water, thus clearly indicating that the states have authority to impose conditions to protect the "beneficial use" of water.

The lower court, in holding that the Bureau need not comply with the "substance" of the states' appropriative permit systems, rested its conclusion on the fact that section 8 does not specifically refer to such systems. App. I, 31. However, if the failure of section 8 to refer to such systems is material, there is no basis for concluding that the Bureau must comply with the "forms" of such systems. As nothing in the section specifically refers to a permit system, nothing in the section can be construed as supporting a distinction between the "forms" and "substance" of such a system. Either the section is sufficiently clear to require federal compliance with the states' permit systems, or it is not. If it is, it requires compliance with the "substance" of the systems; if it is not, it does not require compliance with the "forms" of the systems. Thus, the section does not support the hybrid water right suggested by the lower court. The Bureau must fully comply with the states'

appropriation laws, or it need not comply with those laws at all; it acquires its water rights under the states' appropriation laws or under the "implied reservation" doctrine, but not under a combination of the two. Since the United States concedes that the Bureau does not acquire its water rights under the "implied reservation" doctrine, it follows that the Bureau acquires its water rights under the states' appropriation laws in the same manner as private appropriators, and thus must comply with both the "forms" and "substance" of such laws.

III. THIS COURT HAS HELD THAT SECTION 8 REQUIRES THE BUREAU OF RECLAMATION TO COMPLY WITH STATE APPROPRIATION LAWS TO THE EXTENT NOT INCONSISTENT WITH SPECIFIC, FUNDAMENTAL POLICIES ESTABLISHED BY CONGRESS, WHICH INDICATES THAT SECTION 8 SHOULD BE READ AS NOT AUTHORIZING THE STATES TO IMPOSE CONDITIONS THAT ARE INCONSISTENT WITH THE CONGRESSIONALLY-AUTHORIZED PURPOSES OF FEDERAL RECLAMATION PROJECTS.

A. THE NEBRASKA, IVANHOE AND CITY OF FRESNO DECISIONS.

In *Nebraska v. Wyoming*, 295 U.S. 40 (1935), this Court held that section 8 requires the Secretary of the Interior to acquire appropriative permits under state law, and authorizes the states to control the allocation of water from federal projects. The Court stated:

> "[T]he Secretary of the Interior, pursuant to the [1902] Act, applied to the State Engineer of Wyoming and obtained from him permission . . . to appropriate waters, and was awarded a priority date. . . . *All of the acts of the Reclamation Bureau in operating the reservoirs so as to impound and release waters of the river are subject to the authority of Wyoming. . . .*
>
> "The bill alleges, and we know as a matter of law [citing section 8 of the 1902 reclamation act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, *must obtain permits* and priorities *for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law.*" 295 U.S. at 42, 43. (Emphasis added.)

Similar language was repeated in *Nebraska v. Wyoming*, 325 U.S. 545, 629 (1945). In addition, the Court in the latter case noted that the Secretary had acquired appropriative permits under state law, and that the permits were subject to conditions. *Id.* at 613. Further, it was noted that the Secretary's contracts with water users "provided that after the stored water was released from the reservoir it was under the control of the appropriate state officials." *Ibid.* The Court summarized this factual situation by declaring:

> "We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. *We have a compliance with that directive.*" *Id.* at 614-615. (Emphasis added.)[37]

37. The Court noted, however, that state law can do no more than control water allocations, thus striking down provisions in state law that purported to "regulate the charges which the owners of canals or reservoirs may make for the use of water." *Id.* at 615. Expressing its disapproval of the latter practice, the Court stated that "we do not suggest that where *Congress* has provided a system of regulation for federal projects, it must give way before an inconsistent state system." *Ibid.* (Emphasis added.) Although the United States argues that this language means that the states cannot even control water allocations, it is apparent that the Court merely meant to suggest that state law cannot control matters unrelated to water allocations, such as the price at which project water is sold. In any event, we shall note later our agreement with the proposition that the states cannot interfere with a *congressional* system of regulation, even where water allocations are involved. See pages 58-61, *infra*.

The lower court disregarded the language in the 1945 *Nebraska* decision on grounds that the Court in the latter case refrained from expressing an "opinion whether a different procedure might have

This Court has held, however, that the authority of the states under section 8 is limited by overriding reclamation laws and policies established by Congress. In *Ivanhoe Irrig. Dist. v. McCracken,* 375 U.S. 275 (1958), the Court held that section 5 of the Reclamation Act of 1902, 43 U.S.C. § 431 (1970), which limits the availability of project water to persons with not more than 160 acres of land, overrides the general authority reserved to the states under section 8; hence, the states cannot require project water to be distributed in violation of the acreage limitation in section 5. That acreage limitation imposes a "specific and mandatory" obligation on federal officials that has represented "national policy for over half a century," it was noted; the limitation was the pivotal feature of Congress' effort to make water available for small farmers, and thus prevent the growth of monopolistic power. *Id.* at 291-292. The Court stated:

> "Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5." *Ibid.*

been followed [by the United States] so as to appropriate and reserve to the United States all of these water rights." 325 U.S. at 615; App. I, 72. In fact, the *Nebraska* Court, in refraining from expressing such an opinion, refrained from determining that Congress, by not enacting § 8, might have had the constitutional option of authorizing the Secretary to ignore state law in acquiring unappropriated water, on grounds that the United States "owns" such water. It assuredly did not suggest that the Secretary, given the existence of § 8, has the statutory option of ignoring state law in acquiring such water. The Court made this distinction clear, stating:

> "Though we assume *arguendo* that the United States did own all of the unappropriated water, the appropriations under state law were made . . . pursuant to the procedure which Congress provided in the Reclamation Act . . . [and] in the precise manner contemplated by Congress." 325 U.S. at 615.

Thus, the language relied on by the lower court was addressed to the constitutional powers of Congress, not the meaning of § 8.

Thus, *Ivanhoe* holds that the specific acreage limitation in section 5 overrides the general authority reserved to the states in section 8. The decision thus applies the normal rule of statutory construction that, in conflicts between a general statute and a specific statute relating to the same subject matter, the specific statute controls. See, *e.g., Preiser v. Rodriguez,* 411 U.S. 475, 488-490 (1973); *Enzor v. United States,* 262 F.2d 172 (5th Cir. 1958).

The *Ivanhoe* decision was followed in *City of Fresno v. California,* 372 U.S. 727 (1963). There, the Secretary of the Interior sought to acquire privately-owned water rights under his powers of condemnation, powers that are expressly granted to the Secretary under section 7 of the Reclamation Act of 1902, 43 U.S.C. § 421 (1970). This Court held that, to the extent that state law prevents the Secretary from exercising his condemnation powers, state law must yield to the specific powers vested in the Secretary under section 7.[38] Whatever the state's authority over its unappropriated waters, a state cannot prevent the Secretary from acquiring water already appropriated by others. Thus, *City of Fresno* affirms the proposition that, as in *Ivanhoe,* state law must yield to specific, fundamental provisions of the federal reclamation laws, notwithstanding section 8.[39]

38. The Court stated:

> "However, section 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others." *Id.* at 630.

39. In *City of Fresno,* the Court decided only that state law could not prevent the United States from acquiring water rights by condemnation under § 7 of the 1902 act. It did not reach the question whether the United States, after acquiring such rights, is bound by limitations imposed under state law, such as conditions attached to privately-owned water rights condemned by the United States.

Thus, the two *Nebraska* decisions make clear that the Secretary must acquire his water rights under state law in the same manner as private appropriators, and that state law controls the allocation of waters under the 1902 act. However, the *Ivanhoe* and *City of Fresno* decisions make clear that the states' authority under section 8 is not absolute, and that the states cannot contravene specific, fundamental reclamation policies established by Congress, such as the policies found in sections 5 and 7 of the 1902 act.[40] Here, there is no conflict between federal and state

40. In *Ivanhoe*, the State of California, represented by the State Attorney General's office, joined with the United States in urging this Court to overturn the decision of the California Supreme Court, which had held that California law under § 8 overrides the acreage limitation contained in § 5. Accordingly, this Court properly observed that "there is no clash here between the United States and the State of California." 357 U.S. at 279. The California Attorney General took the position in that case, as in this case, that state law under § 8 cannot override specific, fundamental reclamation policies established by Congress. It was in response to this position that the Court stated in dictum:

> "As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court stated in *Nebraska v. Wyoming*, *supra*, at 615: 'We do not suggest that where *Congress* has provided a system of regulation for federal projects it must give way before an inconsistent state system.' . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State." *Id.* at 291-292. (Emphasis added.)

As we make clear later, we believe that this dictum is correct to the extent that it indicates that the Bureau must acquire its water rights under state law, and that the states cannot interfere with a *congressional* system of regulation. See pages 58-61, *infra*. However, the dictum is imprecise to the extent that it indicates that "the United States [cannot be compelled] to deliver water on conditions imposed by the State," since it fails to note that such conditions may not be inconsistent with a congressional scheme of regulation, as in the present case. In its imprecise form, the dictum is inconsistent not only with this Court's decision in the two *Nebraska*

law, as in *Ivanhoe* and *City of Fresno*. Nothing in federal law authorizes the Bureau to ignore state law in acquiring

cases, but also with the legislative history of § 8; in fact, the Court failed to even refer to that legislative history.

In *Arizona v. California*, 373 U.S. 546 (1963), the Court interpreted various provisions of the Boulder Canyon Project Act ("BCPA"), 45 Stat. 1057 (1928), 43 U.S.C. §§ 617-617t (1970), which provides for construction of reclamation facilities on the Colorado River. Sections 14 and 18 of the BCPA contain language similar to that found in § 8 of the Reclamation Act of 1902, except that §§ 14 and 18 do not require the Secretary to "proceed in conformity with" state laws. *Id.* at §§ 617m, 617q. The States of Arizona and California argued that these sections authorize state laws to override *congressional* schemes for the allocation of BCPA waters. The argument was wholly theoretical, as there were in fact no state laws that had any effect upon the BCPA in that case. Nonetheless, the Court rejected the states' argument. It held that other provisions of the BCPA, particularly § 5 thereof, evince "a congressional plan for the complete distribution of waters to users," and that, under *Ivanhoe*, this "congressional plan" overrides state laws. *Id.* at 587-588. The decision was heavily influenced by the unique legislative history of the BCPA, *id.* at 579-585, and by the fact that, since the Colorado River is an interstate river, a contrary result would subject the projects to the "varying, possibly inconsistent, commands of the different state legislatures," *id.* at 589-590.

In dictum, the *Arizona* Court stated that § 8 of the Reclamation Act of 1902 does not require the United States "in the delivery of water to follow priorities laid down by state law," citing the *Ivanhoe* dictum. *Id.* at 586-587. The Court failed to note, as did the *Ivanhoe* Court, that this dictum is inconsistent with the *Nebraska* decisions, and that the dictum is inconsistent with the legislative history of § 8; as in *Ivanhoe*, the Court failed to even refer to the legislative history of § 8. This dictum has been severely criticized by several authorities in the field of water law, who suggest that the *Arizona* decision should be regarded as no more than an interpretation of the BCPA. See Sax, "Problems of Federalism in Reclamation Law," 37 *Univ. of Colorado L. Rev.* 49, 54-57 (1964); Meyers, "The Colorado River," 19 *Stan. L. Rev.* 1 (1966); Trelease, "Arizona v. California: Allocation of Water Resources to People, States, and Nation," 1963 *Sup. Ct. Review* 158. In any event, as noted above, the *Arizona* dictum is correct if interpreted as precluding the states from interfering with *congressional* schemes for the allocation of water.

Finally, the dicta of *Ivanhoe* and *Arizona* is not applicable here in any event, as the conditions in Decision 1422 do not restrict the Bureau's "delivery" of water, but merely defer its right to fully impound water until it develops its own plan for the delivery of water.

For the above reasons, neither of the lower courts relied on the *Ivanhoe* and *Arizona* dicta in their decisions.

its rights to unappropriated water. To the contrary, the only provision in federal law that authorizes the Bureau to acquire unappropriated water, section 8, specifically mandates it to comply with state law. Thus, this Court's analysis in *Nebraska, Ivanhoe* and *City of Fresno* fully supports our position here.

B. THE HANCOCK AND EPA DECISIONS.

The Court of Appeals primarily relied on this Court's recent companion decisions in *Hancock v. Train,* 426 U.S. 167 (1976), and *Environmental Protection Agency (EPA) v. California,* 426 U.S. 200 (1976). There, the Court ruled that the states cannot apply their permit systems, as authorized under federal acts providing for the control of air and water pollution, to federal agencies in the absence of a "clear and unambiguous" congressional expression. 426 U.S. at 179, 211. Neither case involved an interpretation of section 8, nor involved the unique legislative history, surrounding historical circumstances or administrative practice relating to section 8. The lower court ignored these important differences. It ruled that, since section 8 does not specifically refer to the states' appropriative permit systems, it does not clearly and unambiguously require the Bureau to comply with the "substance" of these systems. App. I, 30-32, 34. The court failed to explain why, if the section is not sufficiently clear to require federal compliance with the "substance" of the states' permit systems, it is sufficiently clear to require federal compliance with the "forms" of the systems.[41]

The lower court failed to note that Congress apparently believes that the "clear and unambiguous" test was improperly applied in the *Hancock* case. In enacting recent legislation that overturns the decision, Public Law 95-95, 91 Stat. 685, 711 (1977), Congress commented in its legislative reports that the new legislation "was the intent of Congress" in passing the original act, but that "some courts, encouraged by Federal agencies, have misconstrued the original intent." S. Rep. No. 94-717, 94th Cong., 2d Sess. 45 (1976).[42] Although rules of statutory construction are developed by the judicial rather than the legislative branch, the judicial branch should not be unmindful of Congress' suggestion that its acts be read more consistently with its effort to accommodate important state interests in our federal system.

In any event, the lower court has applied the "clear and unambiguous" test to reach a result opposite to that intended by Congress. Section 8 clearly requires the Bureau to acquire its water rights under the states' "appropriation" laws, and subjects its rights to state "control" of the "use" and "distribution" of water. As noted above, the states' permit systems are the essence of their appropriation laws. See pages 33-34, *supra*. Hence, if the Bureau is not required to fully comply with the states' permit systems, it is effec-

41. It is perhaps ironic that the lower court used the *Hancock* and *EPA* decisions to reach a result opposite to that in the *Hancock* and *EPA* decisions. There, the Court held that federal agencies must comply with state "substantive" requirements relating to air and water pollution, but not with state "procedural" requirements such as permit systems. 426 U.S. at 181-186, 211-215. Here, the lower court held that the Bureau must comply with the "forms" of the states' permit systems, but not with the "substance" of such systems.

42. Similarly, a bill, recently approved by Congress and currently awaiting presidential signature, would overturn the effect of the *EPA* decision. Section 42, S. 1952, 95th Cong., 1st Sess. (1977). The accompanying legislative report stated that the bill reflects "the intent of Congress" in passing the original act, but that "the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent." S. Rep. No. 95-370, 95th Cong., 1st Sess. (1977).

tively not required to comply with the appropriation laws of most western states. This is, of course, the result that was urged by those who opposed section 8, who favored federal control of water; it is the result that was opposed by those who supported section 8, who favored state control. Thus, the lower court has applied the "clear and unambiguous" test, presumably a guide to understand what Congress has done, to change what Congress has done. The only way that Congress' objective, to require federal compliance with the states' appropriation laws, can be achieved is by requiring federal compliance with the states' permit systems. This Court recently cited with approval Justice Holmes' dictum. "We are not free to say to Congress: 'we see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 597 (1977).

If the normal rules of statutory construction are applied,[43] section 8 clearly and unambiguously requires the Bureau to fully comply with the states' permit systems.

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43. The lower court appeared to assume that the "clear and unambiguous" test supplants the normal rules that this Court has applied in construing federal statutes. This Court has held that a statute must be interpreted consistently with its simple, plain meaning, *Caminetti v. United States*, 242 U.S. 470, 485 (1917), that a statute must be interpreted consistently with its legislative history, *Train v. Colorado Pub. Int. Res. Group*, 426 U.S. 1 (1976), that surrounding historical circumstances are relevant in interpreting a statute, *Mattz v. Arnett*, 412 U.S. 481, 485-494 (1973), and that weight must be given to the administrative interpretation of a statute, *Udall v. Tallman*, 380 U.S. 1 (1964). The lower court's assumption, that the "clear and unambiguous" test supplants these other statutory aids, finds no support in *Hancock* or *EPA*. There, the Court noted that its decisions were consistent with the sparse legislative history and federal administrative interpretation of the acts in question. 426 U.S. at 187-190, 226-227. Thus, the "clear and unambiguous" test is merely one of several statutory aids, and does not supplant other aids.

The section clearly spells out Congress' goal, that the states are to control the appropriation and distribution of water under the 1902 act. It clearly spells out the means by which that goal is to be attained, by requiring the Bureau to be treated as an appropriator under the states' appropriation laws. However, the section does not clearly and unambiguously provide that state law can override specific federal reclamation laws or policies; the section does not address the possibility of conflicts between specific state and federal laws. Thus, *Hancock* and *EPA,* at most, support only the conclusion that the states cannot override specific reclamation laws and policies adopted by Congress. It does not support the conclusion that the Bureau is free to ignore the "substance" of the states' appropriation laws.

More fundamentally, the lower court's application of the "clear and unambiguous" test is inconsistent with this Court's analysis in the *Ivanhoe* and *City of Fresno* cases. In those cases, the Court held that, under section 8, the validity of a state law depends on whether the law is consistent with overriding federal objectives. The lower court held that the state law, at least if it consists of a condition in a permit, is invalid regardless of its consistency with overriding federal objectives. Thus, if the lower decision is correct, the validity of a state law depends on its form, not its substance. If the state law consists of a condition attached to a permit, it is invalid *per se*. If the state law takes another form, its validity depends on its consistency with federal objectives. This distinction suggests that a state legislative body could impose conditions that a state administrative body could not, even though the latter agency may have expertise in the field of water management. This result bears little resemblance to the purposes underlying section 8.

Indeed, it is improper to apply the "clear and unambiguous" test in this case, at least with the same force as in the *Hancock* and *EPA* cases. That test might have validity in cases where, as in *Hancock* and *EPA*, the states seek to regulate traditional federal activities on federal enclaves, such as military bases. The federal activity is in an area that was traditionally regulated by the federal government, and in which the state interest is presumptively marginal. Hence, it is not likely that Congress meant to tolerate state interference in the activity. The same cannot be said where, as here, the federal activity is in an area that was traditionally regulated by the states rather than the federal government, and in which the state interest is vital. In the latter case, it is more likely that Congress meant to provide a balanced accommodation of federal and state interests that allows the states to fundamentally participate in the activity, within the framework of overriding national objectives. Hence, the Court should follow its approach in the *Ivanhoe* and *City of Fresno* cases, not its approach in the *Hancock* and *EPA* cases. It should define the proper scope and limits of state control by defining overriding federal objectives, rather than presume lightly that no such control exists. Cf. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). The analysis in *Ivanhoe* and *City of Fresno* is thus better suited to the complex, delicate issues of federalism in this case than the lower court's simplistic application of the "clear and unambiguous" test.

C. LIMITS OF STATE CONTROL UNDER SECTION 8.

Under a proper interpretation of section 8, the Bureau should be required to comply with the states' appropriation laws, including their permit systems, to the extent that such laws are not inconsistent with the specific reclamation laws and policies adopted by Congress. These overriding

laws and policies should include not only the general laws applicable to all projects, but also the specific laws that authorize, and describe the purposes of, individual projects. In authorizing an individual project, Congress presumably means for the project to succeed, and does not mean for the states to impair their success, regardless of the states' authority under section 8. Thus, where Congress has acted, the states cannot act differently. The authority that Congress gave the states in section 8 is circumscribed by the specific laws and policies established by Congress, including the purposes of its individual projects.

Under this approach, if Congress authorizes a reclamation project for specific purposes, the states cannot impair those purposes. If Congress provides that a project shall impound a specific quantity of water, the states cannot require the project to impound a lesser amount of water, or deny water to the project altogether. If Congress provides that the project's benefits shall be made available to a particular area, the states cannot require that the benefits be made available to a different area. However, where Congress has not spoken, the state's voice must be heard. If, for example, Congress fails to provide that a project's benefits shall be distributed to a specific area, the state is free to establish its own distributive rules if the project's purposes are not otherwise impaired. See generally Sax, "Problems of Federalism in Reclamation Law," 37 *Univ. of Colorado L. Rev.* 49 (1964); Trelease, "Reclamation Water Rights," 32 *Rocky Mtn. L. Rev.* 464 (1960).

This approach protects the federal interest in reclamation, by insuring that the states cannot impair that interest. This approach also protects the state interest, by insuring that the states can control water allocations to the extent

not inconsistent with overriding national goals. This approach is consistent with the broad purpose of section 8 to provide for state control of water. It allows the states, within the limits of overriding national goals, to control water allocations to non-federal users who are the ultimate recipients of water under the 1902 act. It thus continues the tradition that Congress intended to follow in passing section 8, and that has been followed in actual practice ever since. It implements the principles of federalism that lie at the heart of section 8.

This approach allows the states to play an important role in the field of reclamation, thus giving vitality to section 8. Congress, with its many other concerns and its distance from the scene, is not equipped to manage the West's waters on a continuing basis. Hence, in authorizing a reclamation project, it frequently provides only a general description of the project's purposes, expecting that the details will be administratively worked out later.[44] The question, then, is: Who should fill in these details, to the extent that the acquisition and use of water is concerned? Should the details be supplied in part by the states which are most affected by the projects, or should they be ex-

44. The New Melones Project provides a typical example. In authorizing the project, Congress provided that the project would be operated for the purposes of flood control, irrigation, municipal use, industrial use, power, recreation, water quality control and protection of fish and wildlife. 76 Stat. 1180, 1191 (1962). No further specification was made as to how these purposes were to be fulfilled. The authorizing act provided, however, that the project is to be operated "substantially" in accordance with an engineer's report, *ibid.*, which report is contained in H. R. Doc. No. 453, 87th Cong., 2d Sess. (1962). The engineer's report describes the amount of water to be impounded by the project, *id.* at 15, but does not otherwise describe how much water will be used by each of the project's purposes, when the water will be impounded or (except for the preference given to the four counties located in the project basin, see note 5, *supra*) where the water will be used.

clusively supplied by a federal agency that is answerable to no one except, in an abstract sense, to Congress?

There are ample reasons why this authority should rest with the states, to the extent that the acquisition and use of water is concerned. As noted earlier, the federal reclamation function results in the consumption of water by non-federal interests on non-federal lands, not federal consumptive uses on federal enclaves. There is little federal interest in the consumption of water by a particular non-federal user or in a particular non-federal area, assuming that Congress has not addressed these matters. Conversely, there is an important state interest in how or where the water is consumed, assuming that the state has adopted a specific law or policy on the matter. California, for example, is vitally interested in whether the waters of the CVP, which are wholly intrastate, are used to promote urban growth in its congested metropolitan areas or agricultural production in its interior valleys. If Congress has not decided how to allocate water between these interests, it is difficult to see what federal interest prevents California from making the decision.

The acquisition and use of water under the 1902 act has a substantial impact on the economic and political development of the western states. Its use results in a Darwinian-like selection among competing agrarian, municipal and industrial interests, and among competing geographical areas. Its use determines which communities will grow and prosper, and which will blend into the desert. Its use affects the state's environment, the quality of its waters, the habitats of its fish and game. Its use diminishes the availability of water for other uses. Other states are, of course, also affected by the use of such water, for other states may depend on the foods and goods that are the ultimate product

of the federal projects. However, the interests of those other states are adequately protected by the limitations on state control described above. More importantly, no state is affected by the use of such water as much as the state in which the use occurs, particularly where, as here, intrastate waters are involved. It is not hyperbolic to say that the destiny of the western states is tied to the use of such water, and that water is "the very life blood of [their] existence." *Chow v. City of Santa Barbara,* 217 Cal. 673, 702 (1933). Decisions concerning the use of such water are thus too important to the states, too fundamentally intertwined with their economic and political order, to rest exclusively with a federal bureaucratic agency acting with minimal congressional guidance.

In this case, California does not even seek to control the use of water from the New Melones Project. Rather, it seeks only to defer full impoundment of waters for the project until the Bureau develops its own plan for water uses. If California lacks the power to impose even this modest limitation on the federal right, the Bureau would be able to acquire California's unappropriated waters without California even knowing where, or for what purposes, the Bureau intends to use such waters; California would not know whether its waters are to be used in northern or southern California, or primarily for agricultural, industrial or municipal purposes. Since section 8 authorizes the states to control water uses, California has the authority, *a fortiori,* to require the Bureau to develop and submit its own plan for water uses before obtaining California's unappropriated waters.

There is little reason to fear that the western states would impair Congress' reclamation objectives, even if they had such authority under section 8. In passing the 1902 act, Con-

gress expressed the hope that section 8 would "encourage" the western states to adopt more "perfect and uniform" water laws, in order to assist the federal reclamation function. See note 26, *supra.* Similar hopes were expressed by federal reclamation officials after the passage of the act. See note 26, *supra.* Many western states responded by adopting special laws that give federal authorities an advantage over competing users in the acquisition of water rights.[45] Thus, the western states have accomodated, rather than frustrated, federal interests in the field of reclamation. There is a natural harmony between federal and state interests in this field, for both are served by the success of the federal projects. The states have thus responded to federal interests in the way that Congress expected when it adopted its basic reclamation law in 1902. If the states were to respond differently, Congress could alter that law by providing for the acquisition of federal water rights independently of state law. In the three-quarters of a century since the passage of that law, Congress has failed to so act.

Our suggested approach results in a sound policy of water management, for it promotes uniformity of water allocation systems in the western states. It provides that, within the limitations on state control described above, water from

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45. For instance, some states insure an early priority date for federal water appropriations by allowing the United States to reserve unappropriated water prior to filing a permit application. See Trelease, "Reclamation Water Rights," 32 *Rocky Mtn. L. Rev.* 464, 467 (1960). Some states permit state officials to withdraw water from appropriation, so that it may be used for federal purposes. *Ibid.* Some states, such as California, allow state agencies to assign state-held water rights applications, containing an early priority date, to the federal government. *Ibid.* Some states exempt the federal government from procedures that require appropriations to be completed within a certain period after permits are issued. *Ibid.* Some states exempt the federal government from requirements that construction plans be approved by the state. *Ibid.*

federal reclamation projects shall be distributed under the same rules and procedures that apply to other waters. This is not to suggest that absolute uniformity should be achieved, for, as in *Ivanhoe,* Congress' overriding national objectives prevent *all* state laws from being applied to federal water uses. However, where these national objectives are neutral, uniform systems of distribution should be encouraged. The existence of two separate distributive systems in the western states, wholly unintegrated, would result in an inefficient, disjointed system of water management that the water-scarce western states can ill afford.[46]

Finally, western water rights have traditionally been under state rather than federal control. Thus, the states have developed ample skills and experience in the field of water management, and in allocating waters harmoniously with the public interest. Water needs in the West are dynamic, not static; they are constantly changing in response to economic, demographic and environmental factors. California's water needs, for example, have changed with the growth of its metropolitan areas, and with the relative growth of its agricultural industry and decline of its mining industry. Even given the existence of a particular need, such as the needs of a federal reclamation project, it is sometimes difficult to determine precisely how much water is necessary to satisfy the need; even today, the State Board is studying how much water is necessary to achieve the purpose of the New Melones Project to protect downstream fish and wildlife. Thus, those who manage the West's waters must provide a flexible response to competing demands upon water.

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46. In passing § 8, Congress noted that the section "will undoubtedly tend to uniformity . . . of water laws throughout the region affected." H.R. Rep. No. 1468, 57th Cong., 1st Sess. 7 (1902).

This flexibility is the primary virtue of the states' appropriative permit systems. These systems enable the states to keep their fingers on the pulse of their changing water needs. The systems consist of hearing procedures that afford competing water users the opportunity to present evidence and cross-examine witnesses, thus producing a record that provides the basis for judicial scrutiny. *E.g.*, Cal. Wat. Code §§ 1340-1360. Conversely, the Bureau, which has not traditionally controlled water rights, has no equivalent procedures, and thus may be less responsive to local water needs. This is why Congress provided for state control of water, both under the 1902 act and under earlier acts. It believed that local agencies are best equipped to make decisions affecting local needs. Thus, the western states have developed valuable resources, in terms of knowledge and experience in water management, that have always played a crucial role in determining the use of water under the Reclamation Act of 1902, and that should continue to do so.

IV. THE CONDITIONS IMPOSED BY CALIFORNIA ARE NOT INCONSISTENT WITH THE PURPOSES OF THE NEW MELONES PROJECT.

The lower court did not conclude that the conditions in Decision 1422 are inconsistent with the purposes of the New Melones Project. It affirmed summary judgment on the ground that state-imposed conditions cannot be attached to the Bureau's water rights, regardless of whether the conditions are consistent with project purposes.

This Court must conclude, as a matter of law, that the conditions of Decision 1422 are not inconsistent with the purposes of the New Melones Project. The act authorizing

the project expressly requires that the project shall be operated "pursuant to the Federal reclamation laws," 76 Stat. 1191 (1962), which, in section 8 of the 1902 act, expressly provide that a water right exists only to the extent that the water is put to a "beneficial use." See note 14, *supra*. In Decision 1422, the State Board made factual findings, based on the Bureau's own evidence, that the Bureau had failed to develop a plan for the use of project water, and thus had failed to show that its proposed water uses were consistent with the "beneficial use" of water. Df. Ex. 2, pp. 15-16 (App. II, 21-22). The Bureau, although a party to the administrative proceeding that led to the issuance of Decision 1422, did not seek mandamus review of the State Board's findings. Hence, the findings are final under California law. Cal.Wat. Code § 1360; *Temescal Water Co. v. Department of Public Works*, 44 Cal. 2d 90 (1955); *French v. Rishell*, 40 Cal. 2d 477 (1953). They are similarly final under federal law. *United States v. Utah Const. & Mining Co.*, 384 U.S. 394 (1966); *Safir v. Gibson*, 432 F.2d 137 (2d Cir. 1970); *United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806, 857 (S.D. Cal. 1958). Accordingly, the doctrine of collateral estoppel bars the United States from now challenging the validity of the findings. *Ibid.* In fact, the United States conceded below, in oral argument, that it cannot contest the validity of the findings. App. I, 36 n.1. In short, Congress, in authorizing the New Melones Project, did not intend for water to be impounded until a "beneficial use" was shown, and the State Board's findings, that the Bureau has not shown a "beneficial use," are final. Hence, this Court must conclude, as a matter of law, that the conditions of Decision 1422 are fully consistent with the purposes of

the project. Cf. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 621 (1966).[47]

Independently of the doctrine of collateral estoppel, it is clear that the conditions, in deferring full impoundment of project waters until the Bureau develops a plan for their use, are fully consistent with the congressionally-authorized purposes of the project.[48] As noted earlier,

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47. Lower federal courts have held that the doctrine of collateral estoppel is applicable to decisions of administrative agencies, if the administrative proceedings satisfied "procedural and substantive due process" and the findings are "supported by substantial evidence on the administrative record as a whole." *Paramount Transport Systems v. Chauffeurs Local 150*, 436 F.2d 1064, 1065-1066 (9th Cir. 1971). Independently of the doctrine of collateral estoppel, this Court has held that, in determining the constitutionality of administrative decisions, the factual findings of a state agency must be administratively upheld, if supported by substantial evidence and consistent with procedural due process. *Railway Comm'n v. Rowan and Nichols Oil Co.*, 311 U.S. 570, 575-577 (1941); *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 348 (1951); *Morrison-Knudsen Co. v. O'Leary*, 288 F.2d 542, 543 (9th Cir. 1971).

There can be no question that the administrative proceedings leading to the issuance of Decision 1422 satisfy substantive and procedural due process, and are supported by substantial evidence based on the whole administrative record. In proceedings before the State Board, parties are given the right to call and examine witnesses, to cross-examine opposing witnesses, to impeach witnesses, to offer exhibits and to offer rebuttal evidence. 23 Cal. Admin. Code § 733(j). Moreover, the administrative record shows that the State Board's findings were supported by substantial evidence, and indeed were based on the Bureau's own evidence. The reporter's transcript of the administrative proceeding is contained in Defendants' Exhibit 10, the briefs filed by the parties therein are contained in Defendants' Exhibit 11 and the documentary evidence therein is contained in Defendants' Exhibit 12.

48. As noted earlier, the other conditions in Decision 1422 are fairly minor, and simply repeat provisions already found in the congressional act authorizing the New Melones Project, reaffirm contractual obligations voluntarily incurred by the Bureau, and adopt the Bureau's own estimates of water needs for various project purposes. See pages 6-7, *supra*. These conditions do not substantially affect the Bureau's plans to acquire and use water for the project, much less conflict with the congressionally-authorized purposes of the project.

Congress expected the project waters to be used for a proposed unit of the CVP that will apparently not be approved by Congress. See pages 8-9, *supra*. The Bureau has yet to develop an alternate plan for the use of water. Nothing in federal law requires that project waters be fully, and immediately, impounded where there is no congressional plan for the use of the water, and where the Bureau has not developed an alternate plan for its use. Indeed, it would be unwise for a semi-arid state, such as California, to prematurely commit its precious, limited water resources to uses that have not been selected or identified. California looks forward to the time that the project's waters can be impounded, and its purposes fulfilled. However, California should be allowed to know how these waters will be used before it approves their impoundment. Thus, the conditions in Decision 1422 are not inconsistent with congressional law or policy, including the purposes of the New Melones Project; the conditions are inconsistent only with the Bureau's administrative decision to fully impound waters before it develops a plan for their use, a decision that has not been mandated by Congress. Hence, state law conflicts only with a federal administrative decision, not with congressional laws or policies.

V. ASSUMING ARGUENDO THAT SECTION 8 DOES NOT REQUIRE THE BUREAU TO FULLY COMPLY WITH THE STATES' APPROPRIATION LAWS, THE BUREAU SHOULD BE REQUIRED TO FULLY COMPLY WITH THESE LAWS WHEN IT ELECTS TO ACQUIRE ITS WATER RIGHTS UNDER STATE LAW.

Assuming *arguendo* that section 8 does not require the Bureau to comply with state law in acquiring and using water under the 1902 act, the Bureau should nonetheless be required to fully comply with state law when it elects

to acquire its water rights under state law. If, as the United States argues, the Bureau acquires its water rights independently of state law, it should be required to comply with conditions attached to water rights which it elects to acquire under state law. When the Bureau applies for a water right under state law, the state is called on to conduct an expensive, lengthy hearing in processing the application, and to develop conditions that will coordinate the Bureau's water rights with the water rights of state and private appropriators. If the state performs these important functions at the Bureau's request, the Bureau should not be free to retain the state-granted right without complying with the obligations which the state attaches to the right. This result is a simple product of the equitable doctrines of estoppel, and election and waiver. The United States is fully subject to these equitable doctrines. *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 98-99 (9th Cir. 1970); *Hornsby v. Dobard*, 291 F.2d 483, 486 (5th Cir. 1961).

The Bureau acquires an important benefit under the states' appropriation laws, a benefit which may induce the Bureau to comply with state law even if it is not required to do so under section 8. By obtaining its water rights under state law, the Bureau obtains both a recognition and quantification of its water rights without subjecting itself to an expensive, lengthy general stream adjudication involving all competing water claims. See note 34, *supra*.[49] If the Bureau elects to obtain this important benefit under state law, it must, as a matter of equity, fully comply with state law. The Bureau should not be allowed to obtain

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49. Under the so-called McCarren Amendment, the United States is subject to general stream adjudications notwithstanding the doctrine of sovereign immunity. 43 U.S.C. § 666; *United States v. District Court*, 401 U.S. 520 (1971).

the benefits of state law free of the burdens of state law. It should not be allowed to acquire a right under state law without subjecting itself to the duty which the state attaches to the right. Hence, it should not be allowed to obtain a permit without obligating itself to comply with the conditions in the permit.

VI. ASSUMING ARGUENDO THAT SECTION 8 DOES NOT REQUIRE THE BUREAU TO FULLY COMPLY WITH THE STATES' APPROPRIATION LAWS, THE BUREAU MUST FULLY COMPLY WITH THESE LAWS WHEN IT ELECTS TO OBTAIN AN ASSIGNMENT OF STATE-HELD WATER RIGHTS.

Assuming *arguendo* that section 8 does not require the Bureau to comply with state law in acquiring and using water under the 1902 act, the Bureau must nonetheless fully comply with state law when it elects to acquire an assignment of state-held water rights. Under these circumstances, the Bureau is not acquiring a federal water right independently of state law; rather, it is acquiring the state's own water rights. When the Bureau elects to acquire the state's own property rights, it must fully comply with limitations which the state attaches to the rights. The Bureau, as an assignee, cannot obtain greater rights than were held by the assignor, the state agency which held the water rights. Since the assignor would have been bound by the conditions, the Bureau is also bound. A contrary result would not only be inequitable, but would also sanction an unconstitutional federal invasion of the state's property rights, a result which should not be tolerated by a Court which recently reaffirmed the state's constitutional immunity from such invasions. See *National League of Cities v. Usery*, 426 U.S. 833 (1976). Congress avoided these equitable and constitutional problems by

requiring federal compliance with state water laws under section 8.

The lower court held otherwise. It held that the water rights of the California agency, the State Department of Finance, were inchoate at the time of their assignment to the Bureau, since the rights were based on applications that had not yet been approved by the State Board; the rights were not perfected until the State Board approved the applications, at which time the rights were held by the Bureau. App. I, 38-41. The Court stated that, at the time that the assigned applications were thus approved, the Bureau "was acting in the same capacity as when it filed its own applications," and that its "substantive rights arose from the Congressional legislation, not from the assignment." App. I, 40. Hence, the court concluded, the Bureau is not subject to conditions attached to the approved applications. *Ibid.*

However, the decision overlooks the fact that the rights assigned to the Bureau, although inchoate, had the incident of an early priority date, based on the year—1952—that the State agency filed its applications. This early priority date is an important feature of the perfected right now held by the Bureau, for it affords the Bureau a superior right as against competing water users with post-1952 priority dates. This important feature is a product of state law, not federal law. Under federal law, the Bureau can obtain, at most, a priority date based on the date of its *own* applications.[50] Nothing in federal law authorizes the Bureau to obtain an earlier priority date based on the

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50. Even under the "implied reservation" doctrine, a federal agency is only entitled to a priority date based on the date that the water is reserved for federal purposes, *i.e.* the date that the lands are withdrawn from the public domain. *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

applications filed by the State. The Bureau can obtain the earlier priority date only by obtaining an assignment of the State-filed applications. Hence, the lower decision is fundamentally wrong in stating that the Bureau's "substantive rights arose from the Congressional legislation, not from the assignment." App. I, 40. Its rights arose directly from the assignments.

Thus, the inchoate nature of the assigned right is irrelevant. It is relevant only that the right was valuable, in that it enabled the Bureau to obtain an advantage over competing water users. Suppose, for example, that a state holds an inchoate right, such as an option to buy a building, which it sells to a federal agency on condition that the federal agency comply with the state's zoning laws. Clearly the federal agency is bound to comply with the state's zoning laws if it purchases the option, notwithstanding the inchoate nature of the option. This is not to suggest that the federal agency may lack constitutional powers to acquire the building independently of its powers under the option, and thus avoid the encumbrances of the state's zoning laws. However, if the federal agency, in order to gain the benefits of the option, elects to acquire its rights under the option rather than the Constitution, it is bound by the encumbrances of state laws. Similarly, if the Bureau acquires assignments of state-held water rights under state law, it is bound by conditions which the state attaches to the rights, regardless of whether the rights were inchoate at the time of the assignment.

The lower court has confused the difference between the Bureau's own water rights, and State-held water rights that are assigned to the Bureau. If it elects to obtain one such right, it cannot gain the benefits of the other. If it acquires its own water rights, it obtains a permit free of

conditions, assuming *arguendo* that the court's interpretation of section 8 is correct; however, it cannot thus obtain the 1952 priority date that belongs to the State. Conversely, if it acquires an assignment of the State-held water rights, it obtains the 1952 priority date, but is bound by conditions which the State attaches to the rights. The lower decision awards the Bureau the benefits of both kinds of water rights, by allowing the Bureau to obtain a condition-free permit with a 1952 priority date. This result both violates California's constitutional rights under the Tenth Amendment, cf. *National League of Cities v. Usery, supra,* and exceeds the Bureau's authority under section 8.[51]

CONCLUSION

The question in this case is whether the western states can participate in the reclamation process, by controlling federal water appropriations to the extent not inconsistent with overriding congressional objectives. Under these circumstances, the congressional interest is, by definition,

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51. The lower court stated that, at the time that the State-filed applications were assigned to the Bureau, the assignments were not conditioned upon acceptance of State-imposed conditions. App. I, 40. This statement overlooks the fact that the assignments did not become effective until their approval by the State Board, at which time the State clearly expected the Bureau to comply with the conditions therein. Df. Ex. 4 (App. II, 69-71). Moreover, the Bureau, when applying to the State Board for approval of the assignments, expressly agreed that the resulting permits "shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article," and the article in turn provides that such permits shall be effective to the extent that the water "is used for a useful and beneficial purpose in conformity with this division of the [California] Water Code." Df. Ex. 3(a), 3(b) (App. II, 49, 57). Hence, it was clearly expected at all relevant times that the Bureau would comply with conditions attached to the permits resulting from the assignment of the State-filed applications.

neutral. Conversely, the state interest is substantial. Thus, a proper balance of federal and state interests would allow the states to exercise limited control of federal appropriations. In the field of reclamation, congressional and state aims are not inherently contradictory; they are, within limits, compatible. To the extent that they are compatible, both should be served.

This Court has shown increasing willingness to accommodate state interests within the framework of our federal system of government. Under the preemption doctrine, for example, the Court now appears to require "a flexible conception of federal-state relations rather than one of absolute federal supremacy." Note, "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court," 75 COLUM. L. REV. 623, 641 (1975). In applying the preemption doctrine, this Court has interpreted federal statutes in a manner that protects federal interests from state intrusions, but accommodates state interests to the extent that no such intrusions occur. The same balancing approach has been followed in interpreting federal statutes where the preemption doctrine is not involved.[52]

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52. For instance, the Court has held that, in the field of labor law, "the substantive law to apply" with respect to collective bargaining contracts "is federal law, which the courts must fashion from the policy of our national labor laws;" however, "state law, if compatible with the purposes of" federal law, "may be resorted to in order to find the rule that will best effectuate the federal policy." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957). The Court has held that the liability of the states under the federal antitrust laws depends on the nature of the state interest, and the extent to which the state interest is served by the particular act in question. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Bates v. State Bar*, ...U.S. ...., 45 U.S.L.W. 4895 (1977). It has held that, under the Outer Continental Shelf Act, 43 U.S.C. §§ 1331-1343, state laws are applicable on the outer continental shelf to the extent not inconsistent with *specific* federal laws. *Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352 (1959).

The same approach should be followed in interpreting section 8. This approach gives meaning to the principles of federalism on which our constitutional order is based. These principles of federalism guided Congress in enacting its basic reclamation law in 1902, and thus should guide the resolution of the issues here.

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Appendix

Amendment of Section 8 of S. 3057, in the 57th Cong., 1st Sess. (1902), as Discussed in Note 19, Supra.

As passed by the Senate, section 8 of S. 3057 provided:

> "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation; but State and Territorial laws shall govern and control in the appropriation, use and distribution of the waters rendered available by the works constructed under the provision of this act; . . ." S. Rep. No. 254, 57th Cong., 1st Sess. 9 (1902)

In the House amendment, the first sentence quoted above was left intact. The second sentence was deleted, however, and in its place the following language was inserted:

> "[T]he Secretary of the Interior, in carrying out the provisions of this act, *shall proceed in conformity with* such laws and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any *interstate stream* or the waters thereof . . ." H.R. Rep. No. 1468, 57th Cong., 1st Sess. 20 (1902). (Emphasis added.)

The leading congressional authority on reclamation, Congressman Newlands of Nevada, stated that the amended bill was "identical in its provisions, though differing somewhat in phraseology," with the original bill, and that the amended bill was "absolutely in harmony with the original bill." 35 Cong. Rec. 6673-6674. Further, the House report described the amendment as one of several "minor amendments." H.R. Rep. No. 1468, 57th Cong., 1st Sess. 5 (1902). These statements make clear that the amendment was not intended to substantially alter the effect of S. 3057, which, as the

lower court noted, contained a "strong States' rights provision." App. I, 59.

The purpose of the amendment is easily explained. Section 8 was criticized by opponents of the reclamation bill on grounds that the section might be construed to provide the states with *absolute* control of water, and thus enable an upstream state to prevent the flow of interstate waters to users in a downstream state. *E.g.*, 35 Cong. Rec. 6696 (Congressman Ray); H.R. Rep. No. 794 (Minority Rep.), 57th Cong., 1st Sess. 16 (1902). Shortly after Senate approval of the reclamation bill, a meeting was held between President Roosevelt and a congressional delegation, principally to strengthen the anti-monopoly provisions of the bill. 35 Cong. Rec. 6674 (Congressman Newlands).[1] At the meeting, it was agreed to amend section 8 to protect the "right" of downstream users to the waters of an "interstate stream." 35 Cong. Rec. 6672. To remove the inconsistency between the new language and the remaining language that state laws "govern and control" water, the latter provision was stricken as part of the same amendment, in favor of the provision requiring the Secretary to "proceed in conformity with" state laws. *Ibid.* As a result of the amendment, a number of the bill's proponents stressed, during the ensuing House debate, that an upstream state could no longer limit the flow of interstate waters to a downstream state; instead, the Secretary would initially determine the amount of water to be distributed to each state, and each state would then determine how the water is to be distributed within the state. *Id.* at 6759 (Congressman Martin), 6728

1. Newlands stated that the President "was somewhat in doubt as to whether the bill was sufficiently guarded in the interests of homeseekers," *ibid.*, an apparent reference to the provision in the act, § 5, that imposes an acreage limitation and requires residency. See 43 U.S.C. § 431 (1970).

(Congressman Burkett), 6676 (Congressman Mondell). This analysis is confirmed by a contemporaneous account of the meeting between the President and the congressional delegation, which states:

> "Congressmen Sutherland and Mondell strenuously insisted upon the provision for local control remaining in the bill, calling attention to the fact that each of the arid States had passed laws which were the result of years of experience . . .; that these laws were now recognized as controlling the waters, but if the matter were turned over to national control much confusion and friction would result; . . . that inasmuch as it was purely a local matter the people of the various States were in a better position to control the subject than officials in Washington two or three thousand miles away. . . .
>
> "The President substantially acquiesced in this view, but expressed the fear that if the provision that State laws shall control the appropriation of water should remain in the bill, it might be construed as permitting individual States to deny the right of citizens of one State to take water from another, and it was finally agreed that the bill should be so amended as to preclude any construction which would permit any State to deny to the citizens of another State the right to take water from the former into the latter." Df. Ex. 16 (App. II, 114-115).

Thus, the amendment was merely intended to limit state control of interstate waters, not to otherwise transfer control from the states to the federal government.

In interpreting the amendment, the lower court relied on a statement by Congressman Robinson during the House debate. App. I, 60-61. The court failed to mention that Robinson was an opponent of the bill, which tends to discredit his statement. See, *e.g.*, *Schwegmann Bros. v. Calvert*

Distillers Corp., 341 U.S. 385, 394-395 (1951). The court also failed to mention that his statement was concededly based on "newspaper accounts." 35 Cong. Rec. 6670. In any event, Robinson stated that, at the meeting between the President and the congressional delegation, the President favored "national control of canals and water distribution." *Ibid.* Ignoring the fact that Presidents do not always succeed in having their views written into congressional legislation, the court apparently assumed that the President managed to have the bill amended to *eliminate* state control of water. However, the court omitted that portion of Robinson's statement where Robinson stated, to the contrary, that the amendment resulted in a "*blending* of the views of the President for national control and the contrary view of platforms and constitutions for State control." *Ibid.* (Emphasis added.) This "blending" of the views of national and state control was, of course, achieved by eliminating the ability of upstream states to control interstate waters flowing to downstream states. Also, the lower court ignored the fact that Congressman Robinson's statement was immediately clarified in part, and repudiated in part, by Congressman Newlands, who, as noted above, stated that, "if the gentleman [Robinson] will examine the bill, . . . he will find that it is identical in its provisions, though differing somewhat in phraseology," with the original bill. *Id.* at 6673-6674.

The lower court also relied on an autobiographical statement of President Roosevelt published in 1920, in which Roosevelt stated that his "interference was necessary to prevent it [the bill] from being made unworkable by an undue insistence upon States Rights. . . ." *Theodore Roosevelt: An Autobiography* 396 (Scribner & Sons, Inc. 1920); App. I, 61-62. We are unaware of any rule of

law upholding the admissability of an autobiographical statement appearing 18 years after the events described, a difficulty which did not trouble the court. In any event, Roosevelt's statement is nonetheless correct in that he was instrumental in having the bill amended to prevent upstream states from controlling the waters of interstate rivers, an approach which would have indeed made the bill "unworkable by an undue insistence upon States Rights. . . ." Otherwise, Roosevelt favored the view, as expressed in his 1901 message to Congress, that "the distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws . . . ." 35 Cong. Rec. 6675.

Finally, the lower court failed to note that the House debate, which occurred *after* the amendment took effect, clearly indicated that section 8 provides for state rather than federal control of water, and thus removed any doubts concerning whether the amendment was intended to transfer such control from the states to the federal government.

FOR ARGUMENT

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No. 77-285

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals is reported at 558 F. 2d 1347 and appears in the first volume of the appendix (A. I) at pages 28–41. The opinion of the district court is reported at 403 F. Supp. 874, and appears at A. I, 42–96. The opinion of the State Water Resources Control Board appears at A. II, 6–40.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1977 (A. I, 9). A timely petition for rehearing was filed April 15, 1977 (A. I, 9–10).

The petition was denied August 12, 1977 (A. I, 10). A petition for certiorari was filed on August 19, 1977, and granted on December 5, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 8 of the Reclamation Act of 1902 authorizes a State to regulate the operations and uses of a federal reclamation project by placing conditions on the permits it issues to the federal government authorizing the appropriation of water for the project, where sufficient unappropriated water is available.

2. Whether the conditions imposed on the New Melones Project by Decision 1422 of the California Water Resources Control Board are consistent with the federal reclamation laws and with the purposes of the New Melones Project.

3. Whether the United States is estopped from challenging the conditions imposed in Decision 1422.

STATUTES INVOLVED

Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. 383, and the pertinent provisions of the Flood Control Act of 1944, 58 Stat. 888, 33 U.S.C. 701–1, and the Flood Control Act of 1962, 76 Stat. 1191, are set forth *infra* in Appendix B.

STATEMENT

A. THE NEW MELONES PROJECT

The Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. 371 *et seq.*, established a program

for federal construction and operation of reclamation projects to irrigate arid western land. One of the largest of the resulting projects is the Central Valley Project in California.[1] The Central Valley Project was originally authorized by the State of California in the Central Valley Project Act of 1933, Cal. Stats., Ch. 1042. Finding itself unable to finance a project of such magnitude, the State sought to have the federal government take over the project. Congress authorized federal funding of the project under the Act of August 30, 1935 (49 Stat. 1028, 1038), the Act of June 22, 1936 (49 Stat. 1597), and the Act of August 26, 1937 (50 Stat. 844, 850), which provides:

> * * * That the entire Central Valley project, California * * * is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes.[2]

Over the years Congress has authorized additional units of the Central Valley Project. One such unit is

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[1] See *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 279–284, for a description of the Central Valley Project.

[2] The project was subsequently reauthorized under the Act of October 17, 1940, 54 Stat. 1198.

the New Melones Project. The New Melones Project was originally authorized, as one of a number of "works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes," by the Flood Control Act of 1944, 58 Stat. 887, 891, 901. That Act authorized eight million dollars for the "initiation and partial accomplishment" of the New Melones Project (*id.* at 901). The Act also contained general provisions requiring consultation with the States. Section 1 of the Act required the Chief of the Army Corps of Engineers to submit the plans, proposals, and reports for new projects "to each affected State," and further required that the responses of the States be submitted to Congress. 58 Stat. 888–889. The Act additionally provided, in Section 1(c), that the Secretary of the Interior was similarly required to submit his plans, proposals, and reports on proposed projects to the affected States, and that "[i]n the event a submission of views and recommendations, made by an affected State * * *, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress * * *." 58 Stat. 889.

The New Melones Project was modified and reauthorized by the Flood Control Act of 1962, 76 Stat. 1180, 1191. Before this congressional consideration, the project report of the Chief of Engineers was submitted to California, pursuant to the provisions of the 1944 Act requiring consultation with the affected

States. California responded, on April 20, 1962, with a letter and an attached report endorsing the project substantially as proposed by the Corps of Engineers.[3] The project report by the Corps of Engineers was submitted to Congress in June 1962, along with the comments of California, the Department of the Interior, and other interested parties; the entire package was printed as H.R. Doc. No. 453 (New Melones Project, Stanislaus River, California), 87th Cong. 2d Sess. (1962) (hereafter "Project Document"). In enacting the Flood Control Act of 1962, Congress ap-

[3] The letter, addressed to the Chief of Engineers and signed by William E. Warne, Director of California's Department of Water Resources, stated:

"It is concluded in the State's report that the New Melones Project is economically justified and would provide optimum multipurpose development of the waters of the lower Stanislaus River. Furthermore, it is recommended that the Congress authorize the New Melones Project for construction and operation by federal agencies subject to certain provisions specified in the State's report.

"I concur in the conclusions and recommendations contained in the State's report and request that this report be considered as expressing the official views and recommendations of the State of California with respect to the proposed New Melones Project."

The letter is reprinted in an Appendix to this brief; it appears at pages xi–xii of H.R. Doc. No. 453 (New Melones Project, Stanislaus River, California), 87th Cong., 2d Sess. (1962). The attached report appears *id.* at xiii–xxxiii; it is reprinted in Appendix A, *infra*. The "certain provisions" referred to in Mr. Warne's letter as qualifications to the State's endorsement of the project are presumably the minor ones mentioned in the report's "Conclusions" and "Recommendations," pp. 25A–27A, *infra*. They are discussed at pp. 112 n. 80, *infra*. The Department of the Interior also endorsed the project report, by a letter to the Chief of Engineers dated April 25, 1962, which appears at pp. xxxvi–xxxvii of H.R. Doc. No. 453, *supra*.

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proved this report as the standard for the reauthorized project. 76 Stat. 1180, 1191.[4]

The reauthorized New Melones Project provides for a dam on the Stanislaus River (a tributary of the San Joaquin) approximately 35 miles northeast of Modesto, California. The dam will create a reservoir with a gross storage capacity of about 2.4 million acre-feet, extending about 13 miles behind the dam. A hydro-electric power plant with a generating capacity of 300,000 kilowatts is being constructed immediately below the dam.[5] The purposes of the project include flood control, irrigation, municipal, industrial and domestic water consumption, production of hydroelectric power, recreation, water quality control, and preservation and propagation of fish and wildlife. 76 Stat. 1191–1192; A. II, 48.

According to information provided by the Bureau of Reclamation, more than $220 million has been expended to date on the New Melones Project. Construction of the project continues and is well advanced. The dam is more than 80 per cent completed, and it is anticipated that with favorable hydrological conditions water storage can be initiated in late 1978 or early 1979. The power plant is more than 70 per cent completed.

B. THE STATE PROCEEDINGS

In 1960 the Bureau of Reclamation of the Department of the Interior, on behalf of the United States, applied to the State Water Rights Board of California for permits to appropriate unappropriated water from the Stanislaus River for the purposes of the New Melones Project (A. II, 59, 63).[6] In addition, in 1967 the Bureau petitioned the State Water Rights

[4] The Act provides:

"Section 203. The following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and the supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided*, That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this title with funds from appropriations hereafter made for flood control so as to be ready for rapid inauguration of a construction program: *Provided further*, That the projects authorized herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: * * *." [76 Stat. 1180.]

* * * * *

"The New Melones project, Stanislaus River, California, * * * is hereby modified substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 453, Eighty-seventh Congress, at an estimated cost of $113,717,000: * * *." [76 Stat. 1191.]

[5] The Project Document (H.R. Doc. No. 453, *supra*, at 32) specified that although a power plant was not included in the authorization, it was intended that a power plant would be constructed concurrently with the remainder of the New Melones Project immediately below the New Melones dam. The tentative capacity of the plant was 150,000 kilowatts, but the optimal size was to be selected after more detailed studies in conjunction with the Federal Power Commission (*ibid.*). On May 9, 1969, the Chairman of the Federal Power Commission wrote the Secretary of the Army recommending a capacity of 300,000 kilowatts, and this recommendation was approved by the Corps of Engineers and the Bureau of Reclamation.

[6] Application No. 19303 claimed 6,000 c.f.s. (cubic feet per second) for diversion to be directly applied to use for "power pur-

Board for assignment of permit applications that had been filed in 1952 by the California Department of Finance (A. II, 69, 41, 51).[7]

Protests opposing the Bureau's applications were filed by numerous individuals, companies, public agencies (such as the State Department of Fish and Game), and private groups (such as the Sierra Club and the Environmental Defense Fund) (A. I, 50). The protests were based mainly on environmental concerns or asserted conflicts between the Bureau's proposed diversions and prior users (*ibid.*).

On April 4, 1973, after lengthy hearings at which the Bureau and those who opposed its applications presented evidence and arguments, the California State Water Resources Control Board issued Decision 1422 (A. II, 6–40). The Board concluded that there was sufficient unappropriated water available in the Stanislaus River to satisfy the Bureau's requests (*id.* at 16). The Bureau had taken the position that the

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poses," and 2,400,000 acre-feet per annum for diversion to be stored and later applied to use for "power purposes" (A. II, 59). Application No. 19304 claimed 2250 c.f.s. to be directly applied, and 2,400,000 acre-feet per annum to be stored and later applied, to use for the purposes of "irrigation, preservation and propagation of fish and wildlife, and incidental domestic, recreational and water quality control" (A. II, 63; emphasis omitted). Both applications were filed March 11, 1960.

[7] Application No. 14858 claimed 8,800 c.f.s. to be applied directly to beneficial use, and 980,000 acre-feet per annum to be stored and later applied to beneficial use, for "irrigation, domestic, municipal, industrial, fish, culture, recreation, and water quality control purposes" (A. II, 41). No. 14859 was identical to 14558 except that it claimed the water for power purposes (A. II, 51).

Board's function was limited to determining whether there was sufficient unappropriated water available, and that the Board had no jurisdiction to impose any conditions on permits issued to the United States for a federal reclamation project (see A. II, 76–100). The Board rejected this position, reaffirming its earlier decisions holding that the Bureau was subject to state law when it applied for a permit to appropriate water (A. II, 30–31). The Board concluded that under state law it was required to examine the Bureau's applications to determine whether the water would be put to beneficial use, and that:

> In addition, the specific intended use must be evaluated and found to be reasonable, beneficial and *in the public interest* before a permit can issue. The Board undertakes a balancing of competing demands and policy considerations and has broad discretion. [*Id.* at 21; emphasis in original; citations omitted.]

The Board expressed concern that the Bureau had presented "no specific plan for applying project water to beneficial use for consumptive purposes at any particular location" (*id.* at 19–20). The Board stated that the "limited unappropriated water resource of the State should not be committed to an applicant in the absence of a showing of his actual need for the water within a reasonable time in the future" (*id.* at 22), and continued (*ibid.*):

> The lack of evidence that New Melones Project water will be needed for consumptive use outside the four basin counties for many years

> to come, if ever, or that it will be used within these counties at any definite time in the future, raises substantial doubt whether permits should be issued to impound more water in New Melones Reservoir, at least at this time, than is needed for satisfaction of prior rights and non-consumptive purposes—protection and enhancement of fish and wildlife, water quality, recreation and generation of power. [Footnote omitted.]

"To help resolve this doubt," the Board said, it "must consider any adverse consequences of such impoundment" (*id.* at 23). The Board noted that the proposed reservoir would inundate approximately 13 miles of the Stanislaus River now used for whitewater rafting and stream fishing, and it concluded that boating and fishing on the new reservoir "would not adequately substitute for the present recreational uses of the river" (*ibid.*). It concluded (*id.* at 24):

> In view of the preponderance of the adverse consequences of maintaining a reservoir of the size proposed by the Bureau, the public interest requires that any permits issued pursuant to [the Bureau's applications] prohibit the impoundment of water in New Melones Reservoir for consumptive purposes until further order of the Board following a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the permittee has firm commitments to deliver water for such purposes.

Although the Bureau had designated a much larger service area for use of the project's water (*id.* at 19), the Board found that the full yield of the project would eventually be needed in Tuolumne, Calaveras, San Joaquin, and Stanislaus counties (which "include substantial areas in the Stanislaus River basin") (*id.* at 21), and that the Bureau had made no showing of need outside those four counties (*id.* at 24). Accordingly, the Board determined that the permits issued to the Bureau should restrict the place of use of the water for consumptive purposes to those four counties (*ibid.*).[8] The Board held that this preference was required both by state law and by the 1962 Act of Congress authorizing the New Melones Project (*ibid.*).

Finally, the Board considered whether "the project's power benefit alone justifies storage in addition to that presently needed for other purposes"—that is, "whether the need for maintaining the present regimen of the stream outweighs the need for an additional increment of generating capacity during the interim period" (A. II, 27). The Board noted that the annual benefits of the power functions of the proposed project (which would produce 430,000 megawatts annually) were calculated at more than $5.5 million, and that "[t]he opportunity to contribute to

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[8] The Board noted that the permits should also provide that the Board would consider a petition to allow use in areas outside the four counties if the Bureau could show that no other water from the Central Valley Project was available to serve those areas; but use outside the four counties would remain subordinate to use within them (*ibid.*).

the solution of the present power supply problem should not be overlooked" (*ibid.*). But it found that "[t]he recreational uses in question have a value beyond that described by dollar resources only" (*id.* at 28), and went on to rule:

> In view of the foregoing, the Board finds that the reach of river in question is a unique asset to the state and the nation. Until the need for water for consumptive purposes dictates approval of increased storage, the public interest requires that storage for power purposes also be kept at reduced levels. [*Id.* at 28–29.]

In summary, the Board concluded (A. II, 31–32):

> There is unappropriated water available to satisfy the demands of the project as proposed. However, the Bureau has no definite plan as to when or at what specific locations project water will be used for consumptive purposes outside the four basin counties, and it has sufficient surplus water from other sources to meet future increased demands outside these counties for a long period of years. Permits should not be issued for use of water outside these counties at this time.
>
> The public interest requires that the use of the Stanislaus River for whitewater boating, stream fishing and wildlife habitat be protected to the extent that water is not needed for other beneficial uses. Therefore, although there is a demonstrated need for the full yield of the project in the four basin counties at some time in the future, but for which no contracts have been negotiated, and in view of the adverse effect the proposed reservoir will have upon these recreational uses, impoundment of water to satisfy that need should not be permitted at this time. Instead, the Board should retain jurisdiction over the permits for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when the need for the water is substantiated.

* * * * *

> Beneficial use of project water can be made for the generation of power. However, preservation of the existing upstream reach of the river for recreation values conflicts with increased storage for power purposes. Therefore, storage for power generation should be approved, but limited to the amount authorized for other project purposes.
>
> By dedicating the initial project yield to demonstrated needs for flows for water quality control and for fish and wildlife preservation and enhancement and allowing use of these flows for power generation, and by deferring significant impairment of upstream recreational values until a need for other uses is demonstrated, the Board's decision assures the maximum public benefit and maximum utilization of the available resources in the public interest.

In accord with these conclusions, the Board approved the assignment of the State Department of Finance applications to the Bureau, and it approved "in part" those applications and the ones originally filed by the Bureau, but determined that the permits issued to the Bureau should be subject to 25 "conditions and limitations" (A. II, 32–40). These condi-

tions (which are discussed more specifically at pp. 57–86, *infra*) would have the following general effects: (1) prohibiting full impoundment of the waters sought by the Bureau until the Bureau could demonstrate to the Board's satisfaction that the benefits would outweigh the damage and that the Bureau had firm commitments to deliver the water;[9] (2) limiting or controlling the use of project water;[10] (3) reserving jurisdiction in the Board to impose further conditions governing the use of project water;[11] (4) affecting construction and design of the project;[12] (5) imposing on the Bureau various requirements that it report to the Board on the continuing operation of the project;[13] (6) requiring the Bureau to afford access to the project to persons designated by the Board and to members of the public;[14] and (7) imposing other requirements.[15]

C. THE DISTRICT COURT DECISION

The United States then brought the present action against the petitioners (the State Water Resources Control Board, the members of the Board, and the State of California) in the United States District Court for the Eastern District of California (A. I, 11–

[9] See Conditions 1 and 2 (A. II, 33–34; see pp. 61–66, *infra*).

[10] See Conditions 4, 5, 14, 19, 20, 23, 24, 25 (A. II, 35–40; see pp. 67–75, *infra*).

[11] See Conditions 2, 6, 9, 13 (A. II, 34–37; see pp. 75–78, *infra*).

[12] See Conditions 3, 10, 11, 17, 18 (A. II, 34–38; see pp. 78–80, *infra*).

[13] See Conditions 3, 7, 8, 12, 22 (A. II, 34–39; see pp. 80–81, *infra*).

[14] See Conditions 15 and 16 (A. II, 37–38; see p. 82 *infra*).

[15] See Conditions 17 and 18 (A. II, 38).

20). The United States sought a declaratory judgment that the conditions imposed in the permits issued by the Board pursuant to Decision 1422 are void; that the United States may appropriate unappropriated water necessary for federal reclamation projects in California without applying to the Board for a permit; and that if the United States applies for a permit as a matter of comity, the Board must grant the permit if sufficient unappropriated waters are available (A. I, 43–44). Petitioners moved for summary judgment. They conceded that, because of the national implications of the reclamation of arid and semiarid lands, Congress has power to reserve control over federal reclamation projects to the federal government (A. I, 55). They contended, however, that Congress has not done so. They argued that Section 8 of the Reclamation Act of 1902 requires the United States both to acquire water rights for reclamation projects by obtaining permits pursuant to state laws and to comply with the terms and conditions that the States may impose on those permits, so long as the conditions are not expressly prohibited by federal law (A. I, 66).

The district court issued a summary judgment holding that the United States may appropriate any unappropriated water necessary for a federal reclamation project in California; that it must first, as a matter of comity, apply to the State for a determination of the availability of sufficient unappropriated water; but that the State may not impose conditions on the permits issued as a result of those applications

(*id.* at 96). Accordingly, the court declared Decision 1422 void insofar as it attempted to impose such conditions (*ibid.*).

Appraising the legislative history of the Reclamation Act, the court determined that it did not support petitioners' interpretation of Section 8 but "indicates the opposite interpretation: that reclamation is an undertaking of national concern, transcending the often arbitrary geographic boundaries of individual states and territories" (*id.* at 67). The court held that "the comity inherent in a federal system" requires the federal government when acquiring water for its reclamation projects "to comply with the forms of state law, including application to state water boards where necessary, for two purposes: (1) to enable the state to determine, according to its law, whether there is sufficient unappropriated water available for the project; and (2) to give notice to the state of the scope of the project" (*id.* at 69). The court found the prior decisions of this Court interpreting Section 8 to be generally supportive of this view (*id.* at 77), and it found that the Bureau's administrative practice was consistent with its position in this case—"that the Bureau does and will respect existing state water laws and further, that the Bureau does and will comply with state filing requirements *on the basis of comity*" (*id.* at 88–89; emphasis in original).

The court rejected petitioners' contentions that the United States was estopped from attacking Decision 1422 in federal court; the State Board had no jurisdiction to impose terms and conditions on the federal

government, the court held, and hence the United States was not bound to pursue California appellate remedies but could turn to federal court for an interpretation of the applicable federal law (*id.* at 90–92). The court found it unnecessary to decide whether the conditions and terms imposed by Decision 1422 alter or conflict with the purposes of the New Melones Project, in view of its conclusion that the State Board lacked power to impose any conditions on the Bureau's permits (*id.* at 92–93).

Accordingly, since petitioners had conceded by moving for summary judgment that there were no material facts at issue, the court granted summary judgment in favor of the United States, and it entered a declaratory judgment consistent with its opinion (*id.* at 94–96).

D. THE COURT OF APPEALS DECISION

The court of appeals affirmed, "substantially for the reasons stated by Judge MacBride in his opinion" (A. I, 29). The court found additional support for its conclusion in two recent decisions, *Hancock* v. *Train,* 426 U.S. 167, and *Environmental Protection Agency* v. *California,* 426 U.S. 200, in which this Court declined to read statutory language subjecting federal instrumentalities to state law as requiring compliance with state permit requirements (A. I, 29–32). The court of appeals disagreed, however, with the district court's conclusion that the United States is required to obtain state water permits for reclamation projects only as a matter of comity; the court

of appeals held that Section 8 of the Reclamation Act itself requires the United States to invoke the permit procedures provided by state law (*id.* at 33–34).

Judge Carter concurred specially (*id.* at 34–35). He noted his agreement with the panel's interpretation of *Hancock* v. *Train* and *Environmental Protection Agency* v. *California,* and added that he could not "envision the Congress providing that the states, by a permit process, may control the operation of federally constructed, funded, and operated water and power projects" (*ibid.*).

Judge Wallace concurred in part and dissented in part. He agreed that "the language of the statute reviewed here is insufficient to validate California's permit procedure," but rejected the majority's conclusion that Section 8 (or comity) requires the United States to comply with the forms of state law (*id.* at 35–38).

On petition for rehearing, the court of appeals rejected petitioners' contention that the conditions in certain of the permits were valid because a state agency, the Department of Finance, had originally filed the permit applications and later assigned them to the Bureau (*id.* at 38–41). The court concluded that under California law the state agency acquired, and later assigned to the United States, not a permit subject to certain conditions, but only an application for a permit, which carries only a priority right over later applicants. When the applications were assigned they were not subject to the conditions at issue, which

were imposed later by the Board. The court also noted that in this case the assignee was "the Bureau, a Federal agency exercising powers conferred upon it by the Congress of the United States, whose valid enactments are 'the supreme Law of the Land' " (*id.* at 38).

Judge Wallace concurred (*id.* at 41), stating that there was no need to reach any constitutional issue because the court's first ground—that the assignment was merely of an application, not of a conditional permit—was "more than adequate."

INTRODUCTION

The first and fundamental question in this case is whether Section 8 of the Reclamation Act of 1902 authorizes a State to regulate the operation and uses of a federal reclamation project by imposing conditions on the permits it grants to authorize the appropriation of water for the project. Petitioners suggest (Br. 40–45), however, that there is an anterior question. They discuss the issue whether the federal government in acquiring its water rights for a reclamation project must invoke the State's permit procedures at all, or instead can "acquire its water rights independently of state law" (Br. 45), perhaps by invoking the doctrine of reserved federal water rights (see Br. 40–48).

As petitioners themselves emphasize, this question is essentially academic, since "historically * * * the Bureau, under section 8, has acquired its water rights under state law" (Br. 45; see *id.* at 36–40). The Secretary of the Interior in performing his functions under

the reclamation laws has indeed followed the formal procedures of state appropriative law whenever possible, and he did so in this case.[16]

We took the position in the courts below that this custom of the Secretary was not legally required, but was followed only as a matter of "comity." While the district court agreed (A. I, 87–89), the court of appeals concluded that Section 8 itself requires the Secretary to comply with state appropriative procedures to the extent necessary to achieve the two purposes noted by the district court: enabling the State to determine whether there is sufficient unappropriated water available for the project, and giving notice to the State of the scope of the project (A. I, 34).

We do not here challenge the conclusion of the court of appeals on this point. Since the Secretary followed state procedures in this case (and does so regularly), the ruling has no practical effect in this case. And since no evidence was introduced concerning any circumstances in which the Secretary might conclude that comity would not require him to comply with state appropriative procedures, this case does not present an adequate record on which to base a decision

[16] As petitioners note (Br. 43–45), the federal government's compliance with state permit procedures serves the purposes of enabling the State to "quantify the federal water right" and to quantify "the amount of unappropriated water that remains available for use by others" (Br. 43), as well as enabling the State to determine in the first place whether there is sufficient unappropriated water available for the project (see the district court's opinion, A. I, 69).

whether Section 8 requires such compliance as a matter of law.[17]

The disputed issue, thus, is not whether the Secretary must follow the formal requirements of state law in acquiring water rights for a reclamation project. The issue is whether, if he does, Section 8 authorizes the State to place conditions on its appropriation permits so as to achieve a significant measure of control over the operation and uses of the project.

SUMMARY OF ARGUMENT

I

This case is controlled by prior decisions of this Court.

Petitioners claim that Section 8 of the Reclamation Act authorizes a State to place conditions on the permits it grants for the water needed for a federal reclamation project and thus to control and regulate the operations and uses of the project. For example, the first two conditions imposed by Decision 1422 prohibit the Bureau of Reclamation from fully impounding the project waters behind the New Melones Dam—as the Secretary of the Interior has decided to do—until the Bureau demonstrates to the state Board that

[17] Similarly, although petitioners discuss the matter at some length (Br. 40–48), this case does not present the question whether the United States has reserved water rights to the water needed for the New Melones Project. The United States has never claimed any reserved rights in connection with this project, and does not do so before this Court. Whether such rights might be claimed in connection with a reclamation project (*cf. Cappaert* v. *United States*, 426 U.S. 128, 144, n. 9) is not at issue here.

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the benefits of doing so will outweigh the disadvantages (A. II, 34).

Petitioners' claim is at war with the decisions of this Court in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275; *City of Fresno* v. *California,* 372 U.S. 627; and *Arizona* v. *California,* 373 U.S. 546. In those decisions the Court has stated:

> As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. * * * We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.

Ivanhoe, supra, 357 U.S. at 291–292; accord, *City of Fresno, supra,* 372 U.S. at 629–630; *Arizona* v. *California, supra,* 373 U.S. at 586–587.

Those decisions recognize that Section 8 "leave[s] to state law the definition of the property interests, if any, for which compensation must be made" (*City of Fresno, supra,* 372 U.S. at 630). They make it clear, however, that Section 8 does "not subject the Secretary to state law in disposing of water * * *" (*Arizona* v. *California, supra,* 373 U.S. at 587).

The most complete statement of the rationale of those decisions appears in the most recent case, *Arizona* v. *California.* The Court began: "The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities

laid down by state law has already been disposed of by this Court" in *Ivanhoe* and *City of Fresno* (373 U.S. at 586). After quoting *Ivanhoe* (*ibid.*), the Court stated that "where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place" (*id.* at 588).

"It was only natural," the Court continued, "that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make certain that the waters were effectively used" (*id.* at 589). The "vast, interlocking machinery" of the Boulder Canyon Project "could function efficiently only under unitary management," and "[r]ecognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the * * * contract power, to direct, manage, and coordinate their operation" (*id.* at 589–590). Unitary federal control was essential, since subjecting the Secretary to the varying and possibly inconsistent commands of the States "could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow" (*id.* at 590).

The same analysis has governed this Court's interpretation of comparable statutory provisions such as Section 27 of the Federal Water Power Act, 41 Stat. 1077 (16 U.S.C. 821). *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S.

152, 164; *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 445–446.

Faced with this Court's decisions under Section 8, petitioners seek to limit each case to its narrow facts and challenge what they characterize as "dicta," but ultimately they recognize that acceptance of their position would require the Court to overrule those decisions. There is no reason for it to do so. The position the Court has taken is not only consistent with the language and legislative history of Section 8 and with the administrative practice under it, but accurately reflects the policies embodied in the 1902 Act, in the subsequent reclamation laws, and in other federal statutes applicable to reclamation projects.

II

It is necessary to review the conditions imposed on the New Melones Project by Decision 1422. This review demonstrates, among other things, the fallacy of petitioners' claim that the conditions are consistent with the purposes of the project.

A. Conditions 1 and 2 (A. II, 33–34) prohibit full impoundment of the New Melones reservoir until the Bureau of Reclamation is able to convince the state Board that the benefits of doing so will outweigh the disadvantages.

The purposes of the New Melones Project, as stated in the 1962 authorizing Act and in the project report that Congress approved, include flood control, irrigation, power generation, recreation, conservation of fish and wildlife, and municipal, industrial, and

domestic water consumption. Congress directed that the project become "an integral part of the Central Valley Project" and that it "be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements" (76 Stat. 1180, 1191). The project report, which California endorsed at the time of the 1962 congressional authorization, provided for a reservoir with a capacity of 2,400,000 acre feet.

When the United States applied for permits to appropriate the water to fill the reservoir, the state Board determined that sufficient unappropriated water was available but nonetheless imposed Conditions 1 and 2. Condition 1 limits the amount appropriated to 1,420,000 acre feet and bans use of this water for the purposes of irrigation or municipal, industrial, or domestic consumption. Power production is permitted, but the substantial reduction in the quantity of water correspondingly reduces the amount of power that can be generated (and the amount of revenues that can be earned).

Condition 2 then limits the impoundment to the quantity of water necessary to provide annual releases of 98,000 acre feet for the purposes of fish and wildlife (plus the amounts necessary for water quality control, satisfaction of prior rights, and flood control). No additional impoundment is allowed for power, recreation, or new irrigation.

These restrictions apply "[u]ntil further order of the Board." Such order "shall be preceded by a showing that the benefits that will accrue from a specific

proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the [Bureau] has firm commitments to deliver water for such other purposes" (A. II, 34). In making this determination, the Board would have to find that "the specific intended use" was "reasonable, beneficial and *in the public interest*" through "a balancing of competing demands and policy considerations and [the exercise of] broad discretion" (A. II, 21; Board's emphasis).

These conditions give effect to the Board's policy judgments that (1) the recreational uses of the new reservoir would not adequately substitute for the current recreational use of the river for white water rafting and stream fishing, and (2) that the economic benefits of power production would not outweigh the loss of these recreational opportunities. The Board did not consider whether the value of irrigation and of municipal, industrial, and domestic uses would result in outweighing the loss of the existing recreational opportunities, since it concluded that the Bureau had no "firm commitments" to provide water for these uses.

Nevertheless, Condition 2 makes the Board's future authorization of additional impoundment dependent on its determination that the "benefits" will outweigh the "damage" even after the Bureau has made "firm commitments" to deliver water for purposes expressly authorized by Congress.

Conditions 1 and 2 would impair the congressionally authorized purposes of the project by prohibiting the Bureau from impounding the full quantity of water required for those purposes and by specifically prohibiting the use of project water for certain of those purposes. By interfering particularly with the project's irrigation and power functions, which are the main sources of the revenues needed to offset project costs, these conditions would undermine the project's economic viability. By halting impoundment of the reservoir behind the completed dam, these conditions flout the congressional directive that the project be "prosecuted as vigorously as may be consistent with budgetary requirements" (76 Stat. 1180, 1191). In general, the continuing authority claimed by the Board to determine whether the project's purposes should be allowed to proceed is inconsistent with the congressional designation of those purposes.

B. Conditions 4 and 25 (A. II, 35, 40) limit the consumptive use of project water to four named counties. The Board states that it will consider authorizing such use in other areas only on a showing that water from other Central Valley Project sources is not available to serve those areas, and that in any event use outside the four counties is prohibited if the water is "necessary for the development" of those counties.

These conditions are inconsistent with the authorized purposes of the project in several respects. The requirement that water from other Central Valley Project sources be unavailable before New Melones water can be used outside the four counties prevents

the integration of New Melones with the Central Valley Project as Congress directed. The same effect flows from the ban on any use of New Melones water outside the four counties if the Board determines that the water is needed for "the development" of those counties. Moreover, while the authorizing Act directs the Secretary of the Interior to determine the water needs of "the Stanislaus River Basin," and give preference to those needs, before diverting New Melones water to other areas, the "Stanislaus River Basin" is not necessarily coterminous with the four counties that the Board prefers. Nor does the Act refer to "the development" of those counties. Most important, Conditions 4 and 25 claim for the state Board the power to make determinations of water needs and to allocate water on the basis of those determinations, whereas the Act vests that power in the Secretary of the Interior.

C. Condition 5 (A. II, 35–36) requires that water be released from the New Melones reservoir for the purpose of water quality control so as to maintain a concentration of dissolved solids specified in the Condition and a concentration of dissolved oxygen specified in the Board's interim water quality control plan. It further provides that if the interim plan is amended or superseded, the requirements for water quality releases will be modified accordingly. Condition 20 (A. II, 39) reserves to the Board authority to modify the total quantity of water diverted by the project if it should find such modification necessary "to meet water quality objectives in water quality

control plans which have been or hereafter may be established or modified."

Condition 5 does not "reaffirm" the contractual obligation assumed by the Bureau in a 1969 agreement with California's Central Valley Regional Water Quality Control Board, as petitioners contend, but constitutes a one-sided rewriting of that agreement. As its decision shows (A. II, 17–19), the state Board has dropped the limitations that the agreement imposed on the water quality obligations of the New Melones project—specifically, a ceiling on the required releases and a provision that, if conditions required, water quality releases would be restricted to the irrigation season.

Conditions 5 and 20 are inconsistent with the project's purposes because Condition 5 overrides the limitations on the water-quality releases that the Bureau found necessary to protect the other purposes of the project. In addition, the open-ended authority reserved by the Board under Conditions 5 and 20 to require even greater water-quality releases in the future—up to the full yield of the project—could further impede the project's commitments to the other needs and purposes for which it was authorized by Congress. In any event, it is inconsistent with the congressional scheme to vest this decision-making power in the state Board rather than in the Secretary.

It is noteworthy that the state Board, in imposing these water-quality conditions, has overidden an agreement between the federal Bureau and a California water quality control board. This action illustrates

that, rather than promoting state-federal accommodation, the power claimed by petitioners encompasses the unilateral abrogation of federal-state coordination that exists under the present statutory scheme.

D. A review of the 25 conditions imposed by Decision 1422—including many that have not been summarized here but that are discussed below, pp. 75–82, *infra*—demonstrates that, individually and cumulatively, they are not consistent with the purposes of the project. By these conditions the state Board seeks to undo decisions made by Congress and decisions made by federal agencies pursuant to authority granted them by Congress. Even if it were true that the Board's ruling "conflicts only with a federal administrative decision" (Pet. Br. 68), that decision—which petitioners do not claim to be outside the authority delegated by Congress—must prevail under established principles of federal supremacy.

A review of the Board's conditions demonstrates something else. The process of comparing each of the conditions with the purposes of the project is not only laborious, but requires descent to the level of operational detail and specification of project purposes out of a complex process of planning and authorization. It would also require, on petitioners' theory, separation of Congress's "own" decisions, which petitioners concede must control, from the decisions Congress delegated to the Secretary of the Interior, which petitioners claim the state Board may override. Such a process, which petitioners' interpretation of Section 8 will require with respect to a great many reclamation

projects is not an appropriate task to be imposed on the federal courts for them to undertake as a matter of law.

III

Petitioners recognize that the States must defer to "the specific laws and policies established by Congress, including the purposes of its individual projects" (Br. 59). But they contend that unless a specific decision—such as the date of impoundment of the New Melones reservoir—has been made by Congress itself, state agencies should be free to "fill in these details" (Br. 60), even if that means overriding the decision of the Secretary of the Interior (Br. 68). Petitioners' proposal is contrary to the legislative and administrative scheme that Congress has constructed. There is no room in that scheme for the kind of state controls over federal reclamation projects that petitioners seek to establish.

A. Federal reclamation projects are direct federal undertakings, financed, constructed, owned, and operated by the federal government. Federal installations and facilities are traditionally free from state regulation, and cases finding "preemption" where there is a federal regulatory scheme, or a federal licensing program, apply *a fortiori* here. See *Hancock* v. *Train,* 426 U.S. 167; *Environmental Protection Agency* v. *California,* 426 U.S. 200.

In addition, reclamation projects often involve more than one State, a fact cited to the 1902 Congress as requiring a federal program. If States may unilaterally impose conditions on such projects, *which* State's

conditions shall govern? While New Melones involves only a single State, Section 8 cannot be interpreted one way in such a case and differently in "interstate" situations.

B. Congress has adopted a comprehensive array of reclamation laws and policies that leaves no room for mandatory state controls. The 1902 Act itself delegated to the Secretary of the Interior broad authority to carry out the reclamation program. A series of amendments in 1911, 1914, 1920, and 1939 broadened the authority of federal officials and established an expanding list of substantive policies to be implemented through the reclamation laws. This policy infusion has been reflected not only in general amendments to the reclamation laws but in various acts authorizing individual projects.

In addition, Congress during the past 20 years has enacted a variety of broader laws that govern reclamation projects as well as other federal undertakings. These include the Fish and Wildlife Coordination Act of 1958, 72 Stat. 563 (16 U.S.C. 661 *et seq.*), the Federal Water Project Recreation Act of 1965, 79 Stat. 213 (16 U.S.C. 460*l*–12 *et seq.*), and the Federal Water Pollution Control Act, 86 Stat. 816 (33 U.S.C. (Supp. V) 1251 *et seq.*). All these statutes set forth new federal policies and procedures that apply to reclamation projects.

Still more broadly, the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852 (42 U.S.C. 4321 *et seq.*) applies to reclamation projects, as to all other federal undertakings that may affect the quality of the environment, and requires an environmental

impact statement analyzing the evironmental consequences of a proposed project and the available alternatives. The impact of NEPA with respect to a proposed reclamation project is felt both by Congress at the time of the authorization and by the Secretary of the Interior, along with other federal officials, at the time of planning and implementation decisions. If a state agency may subsequently impose its own unilateral conditions on the project, the application of NEPA to the federal decision-making process can be overridden and its purpose defeated.

C. Congress has also responded to the States' desire for a voice in the formulation of reclamation policy and the shaping of individual projects. In a series of enactments, including most of those just mentioned (NEPA in particular), Congress has required the responsible federal officials to consult and coordinate with the States.

The planning of a reclamation project under the Flood Control Act of 1944—under which New Melones was authorized—involves the affected States at several levels. These procedures were followed in the case of the New Melones Project. The State of California was involved in the formulation and planning of the project, and the State's report endorsing the project was submitted to Congress at the time of the 1962 authorization. Federal-state consultation continued after the authorization, as illustrated by the 1969 agreement on water quality control.

These detailed procedures that Congress has provided for federal-state coordination would be pointless

if, as petitioners contend, a state agency may unilaterally impose conditions on a project by including them in appropriative permits.

D. Planning, constructing, and operating a reclamation project are complex undertakings, as this Court has recognized (*Arizona* v. *California, supra,* 373 U.S. at 589). While Congress has provided for extensive federal-state coordination, it has also recognized that someone must have the final administrative authority. Not unnaturally, Congress has lodged that authority in the federal government, and the Secretary of the Interior in particular. Petitioners would lodge it in a state agency, at least "where Congress has not spoken" (Br. 59). Their proposal is not only contrary to the established legislative scheme, but unworkable. It would invite repeated recourse to the state Board by groups or individuals who did not get what they wanted from Congress or the Secretary of the Interior. It would invite repeated rulings by the state Board, as here, on whether or not particular aspects of a project were specifically covered by what Congress had "spoken." And it would invite repeated litigation in which it would be left to the federal courts to determine whether individual conditions imposed by the state Board, such as the 25 conditions involved here, would or would not "impair the purposes" of a project. The practical result would be to transfer to the courts, as arbiters of the federal-state conflict, the administrative decision-making authority over the project that Congress gave to the Secretary of the Interior.

IV

The language, the legislative history, and the administrative construction of Section 8 all support this Court's interpretation in *Ivanhoe, City of Fresno,* and *Arizona* v. *California, supra.*

The legislative history demonstrates that the 1902 Congress viewed reclamation as a matter of national concern, transcending the interests and capabilities of individual states and necessitating the employment of broad federal powers. Section 8 as passed by the Senate provided that "State * * * laws shall govern and control in the appropriation, use, and distribution of the waters rendered available by the works constructed under the provisions of this act," but this language was deleted by the House and state law given the restricted role that it bears in the final Act.

The legislative history in the House supports the view that this role was designed primarily to require the federal government, in obtaining water for reclamation projects, to recognize vested state water rights for the purpose of determining the property interests for which compensation must be paid. The legislative history also provides some support for the view that Congress intended the Secretary to comply with the formal requirements of state law "in matters of recording appropriations of water and in establishing and maintaining the rights of users * * *," in order to enable the State to determine whether sufficient unappropriated water was available and to give notice to the State of the scope of the project. This is consistent with

the Secretary's administrative practice under the Act, as in this case.

The language of Section 8 points to no different conclusion. Even if the direction to the Secretary to "proceed in conformity with" state laws were read as referring to something more than formal legal requirements concerning proprietary rights, the laws referred to are only those laws "relating to the control, appropriation, use, or distribution of water *used in irrigation*" (emphasis added). The conditions imposed by Decision 1422 have little to do with irrigation.

V

Finally, petitioners contend that the United States is barred from challenging the conditions imposed by Decision 1422 for reasons of estoppel, collateral and otherwise. The contention is without merit.

Collateral estoppel precludes a party from relitigating the same issue that was contested and decided in an earlier action. Here, the issue on which petitioners claim the United States to be estopped—whether the permit conditions were consistent with the project's purposes—was not decided by the state Board. Even if it had been, the Board's decision would not have collateral estoppel effect if the United States is correct in its position that the Board lacked authority to impose the conditions on its permits. The United States made clear to the Board that it was reserving the right to challenge any conditions the Board might impose.

Petitioners' claims based on the equitable doctrines of estoppel, election, or waiver are likewise without merit.

The fact that two of the permit applications were originally filed by a state agency, and subsequently assigned to the Bureau of Reclamation, requires no different result. As the court of appeals held, applying California law, the assignment was only of an application—not of a permit with conditions—and there is no claim that the assignment was conditioned on the Bureau's acceptance of any conditions that might subsequently be attached to resulting permits.

I

DECISIONS OF THIS COURT FORECLOSE THE CLAIM THAT A STATE MAY IMPOSE CONDITIONS ON A FEDERAL RECLAMATION PROJECT

Petitioners claim that Section 8 of the Reclamation Act authorizes a State, in issuing permits to the federal government to appropriate previously unappropriated water for a federal reclamation project, to impose conditions that give the State a substantial measure of control over the operation of the project. For example, the first two of the 25 conditions imposed on the New Melones Project by Decision 1422 would prohibit the Bureau of Reclamation from fully impounding project waters behind its dam "until the Bureau develops a plan for their use" (Pet. Br. 67) which is satisfactory to the state

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Board—in the words of Condition 2 (A. II, 34), until the Bureau presents the Board with "a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result * * * and that the [Bureau] has firm commitments to deliver water for such other purposes." [18]

Petitioners' contention that Section 8 authorizes a State to impose such conditions on the operation of a federal reclamation project is at war with a line of decisions of this Court. We will now review those decisions.

A. NEBRASKA *v.* WYOMING

The first case in which the Court adverted to state control of reclamation projects was *Nebraska* v. *Wyoming,* 325 U.S. 589, decided in 1945. That was an original action between States, seeking an equitable apportionment of the North Platte River, in which the United States intervened. The United States claimed "that it owns all the unappropriated water in the river" by virtue of its original ownership of all the surrounding lands (*id.* at 611). The Court bypassed this claim. It noted that the Secretary of the Interior had applied for state permits to appropriate water for reclamation projects on the river, pursuant to Section 8 of the Reclamation Act, and that "[t]hose filings were accepted by the state officials as adequate under state law" (*id.* at 613). Thus, "the water rights on which the North Platte Project and the Kendrick Project rest have been obtained in

[18] See pp. 59–66, *infra*; for a full review of the conditions imposed by Decision 1422, see pp. 57–86, *infra.*

compliance with state law. Whether they might have been obtained by federal reservation is not important." *Id.* at 612.[19]

The question remained whether the water rights obtained under state law belonged to the United States or to the individual users of the project water. The Court held that since "[t]he contracts between the United States and the irrigation districts provided that after the stored water was released from the reservoir it was under the control of the appropriate state officials" (*id.* of 613), and the state officials then caused the State to issue permits which "named as appropriators the individual landowners" (*ibid.*), the rights belonged to the individual landowners rather than the United States (and hence were apportionable to their respective States). "[T]he appropriations under state law were made to the individual landowners pursuant to the procedure which Congress provided in the Reclamation Act" (*id.* at 615).

The United States had expressed the fear that this conclusion might give the States control over the management and operation of federal projects. The court responded to this fear with a statement that it has quoted and followed in the subsequent cases (see pp. 43–44, 48–49, *infra*):

> It is argued that if the right of the United States to these water rights is not recognized,

[19] The Court also said (*id.* at 615): "We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made."

its management of the federal projects will be jeopardized. It is pointed out, for example, that Wyoming and Nebraska have laws which regulate the charges which the owners of canals or reservoirs may make for the use of water. *But our decision does not involve those matters. We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system.* We are dealing here only with an allocation, through the States, of water rights among appropriators. *The rights of the United States in respect to the storage of water are recognized.* So are the water rights of the landowners. To allocate those water rights to the United States would be to disregard the rights of the landowners. To allocate them to the States, who represent their citizens *parens patriae* in this proceeding, *in no wise interferes with the ownership and operation by the United States of its storage and power plants, works, and facilities.* Thus the question of the ownership by the United States of unappropriated water is largely academic so far as the narrow issues of this case are concerned. [325 U.S. at 615–616; emphasis added; footnote omitted.] [20]

[20] Petitioners rely (Br. 48–49) on the Court's decision ten years earlier on a procedural point in the same case, *Nebraska* v. *Wyoming*, 295 U.S. 40. At that time the United States had not yet intervened in the case; Wyoming moved to dismiss Nebraska's complaint on the ground that the United States was an indispensable party, and the Court denied the motion. The first paragraph that petitioners quote from the opinion (Br. 48) is from the paragraph in which the Court recited "[t]he allegations of the bill, in summary * * *" (295 U.S. at 41–42).

B. IVANHOE IRRIGATION DISTRICT *v.* M'CRACKEN

The next case was *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, decided in 1958. The California Supreme Court there had held invalid certain provisions in contracts between the United States and two California irrigation districts and a water agency for the furnishing of Central Valley Project water (47 Cal. 2d 597, 306 P. 2d 824; see 357 U.S. at 285–289). The contracts contained provisions incorporating the requirement of Section 5 of the Reclamation Act of 1902 [21] prohibiting the furnishing of project water to lands in excess of 160 acres in single ownership, and the requirements of the Reclamation Project

The second paragraph petitioners quote (Br. 48–49) is from the Court's discussion of Wyoming's contention that the suit must be dismissed because the United States was not made a party (295 U.S. at 43). The Court stated: "The bill alleges, and we know as a matter of law [citing Section 8 of the Reclamation Act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under state law" (*Ibid.*).

As noted earlier (pp. 19–21, *supra*), the United States does not here challenge the proposition that the Secretary "must obtain permits and priorities for the use of water from the State * * *." While the issue thus is not disputed here, it would not be reasonable to read the Court's statement in ruling on the procedural point in *Nebraska* v. *Wyoming* as conflicting with its opinion on the merits ten years later, in which it expressly left open the question whether the United States might have successfully claimed a reserved right to the water, or followed some other procedure, instead of proceeding under state law (325 U.S. at 614, 615, quoted at page 39 and note 19, *supra*). See *Arizona* v. *California*, 373 U.S. 546, 588 n. 92.

[21] 32 Stat. 389.

Act of 1939 [22] that water users repay certain project costs over a 40-year period. See 357 U.S. at 285–287. The California Supreme Court held that these contract provisions violated California law, and that California law governed by virtue of Section 8 of the Reclamation Act of 1902, by which "the federal government * * * has recognized that the law of this state is determinative of rights to water in this state" (47 Cal. 2d at 628, 306 P. 2d at 842; see 357 U.S. at 288).[23]

This Court unanimously reversed. The Court began by "set[ting] aside as not necessary to decision here the question of title to or vested rights in unappropriated water" (357 U.S. at 290–291), citing the decision on the merits in *Nebraska* v. *Wyoming, supra,* 325 U.S. at 611–616. The Court stated that "the authority to impose the conditions of the contracts here comes from the power of the Congress to condition the use of federal funds, works, and projects on compliance with reasonable requirements" (357 U.S. at 291). "And, again, if the enforcement of those conditions impairs any compensable property rights, then recourse for just compensation is open in the courts" (*ibid.*). The Court noted that the decision of the California Supreme Court "turned on the court's interpretation of § 8 of the 1902 Act" (*id.* at 289), and it analyzed the application of Section 8 as follows (357 U.S. at 291–292; emphasis added):

> As we have noted, the Supreme Court of California first concluded that the provisions of § 8 of the 1902 Act as to the application of state law were absolute, and controlled all provisions of the Act and other reclamation statutes having to do with "the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder * * *." We believe this erroneous insofar as the substantive provisions of § 5 of the 1902 Act are concerned. *As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in Nebraska* v. *Wyoming, supra, at 615: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system."* Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects, providing that "[n]o right to the use of water * * * shall be sold for a tract exceeding one hundred and sixty acres to any one landowner * * *." *We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.* To read § 8 to the contrary would

[22] The repayment provisions were based upon Section 9(d) and (e) of the Reclamation Project Act of 1939, 53 Stat. 1195, 1196, as amended, 43 U.S.C. 485h (d) and (e).

[23] The court concluded that state law forbade restrictions on irrigation water deliveries based on the size of a farm. 47 Cal. 2d at 637, 306 P. 2d at 848.

> require the Secretary to violate § 5, the provisions of which, as we shall see, have been national policy for over half a century. Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reffirmed national policy of § 5. [24]

Finally, the Court rejected claims that inclusion of these provisions in the contracts violated constitutional requirements. The Court noted that the federal government had constitutional authority to undertake large-scale reclamation projects to promote the general welfare, and that "[i]n developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, § 8, of the Constitution, but also from Art. IV, § 3, relating to the management and

[24] Petitioners acknowledge (Br. 52–53, n. 40) that this passage from the Court's *Ivanhoe* opinion, particularly the statement that "nothing in § 8 * * * compels the United States to deliver water on conditions imposed by the State," is contrary to their position here. They call it "dictum" and "imprecise" (*id.* at 52, n. 40). They also seek to distinguish it on the basis that "the conditions in Decision 1422 do not restrict the Bureau's 'delivery' of water, but merely defer its right to fully impound water until it develops its own plan for the delivery of water" (*id.* at 53, n. 40). But if the State cannot impose conditions on the United States' delivery of water from a reclamation project, *a fortiori* it cannot impose conditions on the impounding of the water in the first place, which is part of the construction and operation of the project.

disposal of federal property." *Id.* at 294. The Court concluded (357 U.S. at 295):

> Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. See *Berman* v. *Parker,* 348 U.S. 26 (1954), and *Federal Power Comm'n* v. *Idaho Power Co.,* 344 U.S. 17 (1952). The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof. *Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. Public Utilities Comm'n of California* v. *United States,* 355 U.S. 534 (1958). Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action. [Emphasis added.]

C. CITY OF FRESNO *v.* CALIFORNIA

In *City of Fresno* v. *California,* 372 U.S. 627, decided in 1963, the Court, following *Ivanhoe,* again rejected the claim that Section 8 required the Secretary to follow state water law in operating a component of the Central Valley Project. In litigation over the Project's Friant Dam, the city urged that since Section 8 required the Secretary to proceed under state law, he was obliged to respect the city's California statutory priority for municipal and domestic use of water over irrigation use, its statutory priority for

use of water in its county of origin, and its statutory entitlement to water at the same (lower) rate charged for irrigation purposes (372 U.S. at 628–629).[25] Fresno thus claimed that the Secretary could not condemn water currently being used for purposes having priority under state law and then use it for irrigation, a use with lower priority under state law.[26]

The Court rejected this construction of Section 8, stating (372 U.S. at 629–630; emphasis added):

> Petitioner seems to say that § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383, requires compliance with California statutes relating to preferential rights of counties and watersheds of origin and to the priority of domestic over irrigation uses. However, § 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain. This was settled in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958). *Rather, the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made.* [27]

[25] See the petitioner's brief in *City of Fresno* v. *State of California*, No. 51 October Term 1962, at 51–72, 140–142. See also the respondents' brief in the companion case, *Dugan* v. *Rank*, No. 31, October Term 1962, at 46–60. The claims of the parties in the lower courts and the lower court opinions are discussed in the companion case, *Dugan* v. *Rank*, 373 U.S. 609, 616–617, and n. 4.

[26] See materials cited in note 25, *supra*.

[27] The Court's view of Section 8 as concerned to assure federal compensation for the taking of property rights in water as defined by state law was earlier expressed in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 734–736. The Court there upheld

D. ARIZONA *v.* CALIFORNIA

The Court's most recent decision interpreting Section 8 was *Arizona* v. *California*, 373 U.S. 546, decided in 1963 (subsequent to *City of Fresno*). In that case, involving allocation of the waters of the Colorado River, the Court reaffirmed its statements in *Ivanhoe* and *City of Fresno* that Section 8 did not require the United States in the delivery of reclamation project water to follow the priorities of state law.

Section 8 was made applicable to the controversy in *Arizona* v. *California* by the Boulder Canyon Project Act, 1928, ("BCPA"), 45 Stat. 1057, as amended, 43 U.S.C. 617–617t, which authorized the Secretary of the Interior to construct, operate, and maintain a dam and other works on the Colorado River. Section 14 of the BCPA, 43 U.S.C. 617m, provided that "the reclamation law" (including, of course, Section 8 of the 1902 Act) "shall govern the construction, opera-

compensation awarded against the United States for water rights impaired by the Friant Dam, and stated:

"We cannot disagree with claimants' contention that in undertaking these Friant projects and implementing the work as carried forward by the Reclamation Bureau, Congress proceeded on the basis of full recognition of water rights having valid existence under state law. By its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws. [Citing Section 8.] * * * We think it clear that throughout the conception, enactment and subsequent administration of the plan, Congress has recognized the property status of water rights vested under California law" (339 U.S. at 734–736).

tion, and management" of the Boulder Canyon Project, except as otherwise provided, and Section 18 of the BCPA, 43 U.S.C. 617q, substantially restated Section 8 of the 1902 Act:

> Nothing herein shall be construed as interfering with such rights as the States had on December 21, 1928, either to the waters within their borders or to adopt such policies and enact such laws as they deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River Compact or other interstate agreement.

The Court held, reversing the Special Master, that while Section 8 was thus applicable, it nonetheless had no influence on the intrastate distribution of water from the Boulder Canyon Project. "[W]e hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections to follow state law" (373 U.S. at 586).

In so holding the Court reaffirmed both *Ivanhoe* and *City of Fresno*, stating (373 U.S. at 586):

> The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this Court in *Ivanhoe Irr. Dist.* v. *McCracken*, 357 U.S. 275 (1958), and reaffirmed in *City of Fresno* v. *California*, 372 U.S. 627 (1963).

The Court then quoted from *Ivanhoe* the passage stating that Section 8 merely requires the United States to comply with state law when it condemns water rights, that the acquisition of water rights is not to be confused with the operation of federal projects, and that nothing in Section 8 compels the United States to deliver water on conditions imposed by the State (357 U.S. at 291–292, quoted at 373 U.S. at 586; quoted at pp. 43–44, *supra*). The Court concluded:

> Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with *Ivanhoe*, hold that the Secretary must be bound by state law in disposing of water under the Project Act. [373 U.S. at 587.]

The Court likewise rejected the claim that Section 18 of the BCPA—which substantially restates Section 8—required the Secretary to follow state law in the contracts he made to allocate project waters. The Court reasoned that when the federal government has "undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws" (*id.* at 587). The Court added: "[W]here the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place" (*id.* at 588).

The Court also noted that "[i]t was only natural that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make

certain that the waters were effectively used," and that "[a]ll this vast, interlocking machinery * * * could function efficiently only under unitary management * * *" (*id.* at 589). The Court concluded:

> Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation. Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow. [*Id.* at 589–590.] [28]

[28] The significance of *Arizona* v. *California*, and its applicability to a reclamation project entirely within one State (the Central Valley Project in particular), has recently been recognized by the California Supreme Court in *Environmental Defense Fund* v. *East Bay Municipal Utility District*, 142 Cal. Rptr. 904, decided December 20, 1977. That was a suit against a California municipal utility district challenging a contract it had made with the Bureau of Reclamation to purchase water from the Central Valley Project and build a canal to divert it, on the ground that the district's decision to enter into the contract violated state constitutional and statutory provisions regarding the reasonable use of water (see 142 Cal. Rptr. at 906, 911–912). Relying on *Arizona* v. *California*, the California Supreme Court affirmed a judgment dismissing the suit. While noting that *Arizona* v. *California* involved several States rather than one, the court found that this Court's reasoning applied to single-state projects and that it represented "the proper construction" of Section 8 (142 Cal. Rptr. at 910). The California court said of this Court's decision in *Arizona* v. *California*:

"The [C]ourt held that Congress preempts state laws not only when direct conflict exists but also when danger exists in that state law either interferes with the secretary's expressly delegated powers, frustrates operation of the project, or limits the benefits of the project" (142 Cal. Rptr. at 910).

Justice Mosk dissented, arguing that the plaintiffs did not seek to impose their will on the federal government, "but merely to hold a state-created agency accountable under state law for whether and to what extent it may initiate a contract to purchase water" (*id.* at 914). But Justice Mosk noted, citing *Ivanhoe*: "If any agency were to attempt to place in issue, or to dictate to a federal bureau, the terms which the latter may impose as to the quantity, price, site or other conditions for the sale of water from a federal project, undeniably there would be preemption and federal law would prevail." *Ibid.*

[29] The Court's analysis of Section 18 of the Boulder Canyon Project Act in *Arizona* v. *California* has already been described (pp. 49–50, *supra*).

E. DECISIONS OF THIS COURT IN COMPARABLE AREAS

1. FIRST IOWA HYDRO-ELECTRIC COOPERATIVE V. FEDERAL POWER COMMISSION

The Court's interpretation of Section 8 in the cases just reviewed is consistent with its interpretation of similar provisions in other statutes.[29] Perhaps the closest analogous case is *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, which dealt with the licensing of water power projects under the Federal Water Power Act, 41 Stat. 1063, as amended, 16 U.S.C. 791a *et seq.* The Court there interpreted a provision similar to Section 8 as protecting proprietary water rights vested under state law, but not as subjecting federal projects to state veto or control.

Section 27 of the Federal Water Power Act, 16 U.S.C. 821, is similar to Section 8 of the Reclamation Act, but broader. It provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.[28]

Section 9(b) of the Federal Water Power Act, 16 U.S.C. 802(b), further requires that an applicant for a federal license present satisfactory evidence that he "has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect * * * to the appropriation, diversion, and use of water for power purposes * * *."

On the basis of these provisions, the Federal Power Commission in *First Iowa* dismissed the petitioner's application for a license to construct a dam, reservoir, and hydro-electric power plant on the Cedar River, a navigable river in Iowa, on the ground that the petitioner had not obtained the permit required under state law. 328 U.S. at 162. State law made " 'the method of construction, operation, maintenance, and

[28] Unlike Section 8, Section 27 does not limit its reference to state laws to those relating to water "used in irrigation" (see pp. 126–129, *infra*).

equipment' " of dams subject to the approval of the state Executive Council. 328 U.S. at 165. Moreover, a central feature of the proposed plan, the diversion of "substantially all of the waters of the Cedar River near Moscow, to the Mississippi River," would have contravened state law, which required that any water diverted from a stream be returned at the nearest practicable point. 328 U.S. at 166.

This Court stated that construing Sections 27 and 9 to require the petitioner to secure the grant of a state permit as a "condition precedent" to securing a federal license "would vest in the Executive Council of Iowa a veto power over the federal project" that "easily could destroy the effectiveness of the Federal Act." 328 U.S. at 164. It recognized that Section 27 "expressly 'saves' certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act" (328 U.S. at 175). But it went on to hold:

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. [*Id.* at 175–176.]

The Court also found that Section 9 was aimed primarily at the marshalling of information, and that nothing in the language of that section required compliance with state laws. 328 U.S. at 177.

The Court rejected the contention that either Section 9 or Section 27 required the "subjection of the federal license to requirements of the state law on the same subject" (328 U.S. at 179). "The inappropriateness of such an interpretation is apparent," the Court said, in view of the congressional intention "to secure a comprehensive development of national resources * * *" (328 U.S. at 179–181). "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls" (*id.* at 181). "It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as on behalf of all others" (*id.* at 182)."

See also *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 445–446.

" Subsequent decisions interpreting and applying Section 27 of the Federal Water Power Act have emphasized its similarity to Section 8 of the Reclamation Act and have relied on this Court's interpretation of Section 8 in *City of Fresno* v. *California*, 372 U.S. 627, and *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275. See *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 453 F. 2d 463, 478 (C.A. 2), certiorari denied, 407 U.S. 926; *State of California* v. *Federal Power Commission*, 345 F. 2d 917, 923 (C.A. 9); and *Portland General Electric Co.* v. *Federal Power Commission*, 328 F. 2d 165, 176–177 (C.A. 9).

2. THE HANCOCK AND EPA DECISIONS

Finally, as the court of appeals noted (A. I, 29–32), two recent decisions of this Court provide additional support for this Court's consistent interpretation of Section 8.

In *Hancock* v. *Train,* 426 U.S. 167, 198, the Court concluded that although Congress had intended by Section 118 of the Clean Air Act, as redesignated and amended, 84 Stat. 1678, 1689, 42 U.S.C. 1857f, to require federal facilities to comply with air quality and emission standards established by the States, it had not made federal facilities subject to state permit requirements and thus authorized States to prohibit the operation of these facilities in the absence of a state permit. Invoking principles of federalism laid down in *McCulloch* v. *Maryland,* 4 Wheat. 316, 427, the Court stated (426 U.S. at 179):

> Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found **only when and to the extent there is a** "clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous.". [Footnotes omitted.]

In *Environmental Protection Agency* v. *California,* 426 U.S. 200, the Court followed the reasoning of *Hancock* and concluded that Section 313 of the Federal Water Pollution Control Act, as added, 86 Stat 875, 33 U.S.C. (Supp. V) 1323, which requires federal

installations to comply to the same extent as nonfederal facilities with state "requirements respecting control and abatement of pollution," did not require federal facilities to secure a state permit as a condition of operation.[32] As Judge Carter noted in his concurring opinion in the court of appeals (A. I, 34–35), the issue presented in *Hancock* and *Environmental Protection Agency* v. *California* was closer than the issue presented here:

> I would suggest, however, that it may be one thing for the Congress to provide that a state may require a permit to assure proper air or water quality standards of a federally-owned or operated installation; it is quite another thing to permit a state to require permits for the very operation of such a facility. I cannot envision the Congress providing that the states, by a permit process, may control the operation of federally constructed, funded, and operated water and power projects.

F. CONCLUSION

Faced with this Court's decisions in *Ivanhoe, City of Fresno,* and *Arizona* v. *California,*[33] plus the Court's parallel decisions in comparable areas, petitioners seek to limit each case to its narrow facts (Br. 51–53 and n. 40, 54).[34] They proceed to challenge what they call the "dicta" in *Ivanhoe, City of Fresno,* and *Arizona* v. *California* (*id.* at 52–53 n. 40), and, ultimately, they ask the Court to overrule this established line of decisions.[35] As we will show, however, the position this Court has taken in those cases is not only consistent with the language and legislative history of Section 8 and with the administrative practice under the 1902 Reclamation Law, but accurately reflects the considerations of public policy embodied in that Act and in the subsequent legislative and administrative development of reclamation law.

[32] Petitioners note (Br. 55 and nn. 41–42) that Congress subsequently amended the provisions considered in *Hancock* and *Environmental Protection Agency* v. *California* to provide expressly that federal installations would be subject to state permit requirements. In contrast, Congress has not disturbed the Court's construction of Section 8 in the 20 years since the decision in *Ivanhoe* and the 15 years since *Arizona* v. *California.*

[33] A similar decision was rendered by the Ninth Circuit in *Turner* v. *Kings River Conservation District*, 360 F. 2d 184, where the court considered the argument that water storage for irrigation in the Pine Flat reservoir should be enjoined because the Secretary had not acquired a permit as required by California law. The court rejected the contention, stating (360 F. 2d at 198):

"We must agree with the government that 'reason precludes an interpretation of the general provisions of Section 8 of the Reclamation Act [of 1902] and Sections 1 and 8 of the Flood Control Act [of 1944] which would impute to Congress an intention to frustrate its plans for this project by subjecting it to the risk that it might never be used for some of the authorized purposes, should a state permit not be forthcoming'."

[34] Petitioners do not discuss the *First Iowa* decision.

[35] Dean Charles J. Meyers, as *amicus curiae*, acknowledging that the "*Ivanhoe dictum*" became "apparent holding" in *City of Fresno*

II

THE CONDITIONS IMPOSED IN DECISION 1422 ARE INCONSISTENT WITH THE PURPOSES OF THE NEW MELONES PROJECT AND EXEMPLIFY THE UNWORKABILITY OF PETITIONERS' CONSTRUCTION OF SECTION 8

Petitioners recognize that the States "may not interfere with specific, fundamental reclamation laws

and policies established by Congress" (Br. 14). They contend, however, that interpreting Section 8 to allow the States "to control federal water rights" to the extent exemplified by the conditions of Decision 1422 "removes any basis for a fear that national interests will be overridden by state interests" (Br. 17). These conditions, petitioners claim, "do not substantially affect the Bureau's plans to acquire and use water for the project, much less conflict with the congressionally-authorized purposes of the project" (Br. 67 n. 48), though they admittedly conflict with "a federal administrative decision" of the Bureau of Reclamation (Br. 68). The *amici* States similarly contend that allowing States to impose conditions such as those of Decision 1422 is sound public policy that accommodates both state and federal interests (Br. 16–18).

A review of the conditions imposed on the New Melones Project by Decision 1422 demonstrates the fallacy of these contentions. It shows that these conditions are in many ways inconsistent with federal policy decisions embodied in the project, and typically with congressional decisions as well as administrative ones. It shows that interpreting Section 8 to allow the States to impose such conditions on federal reclamation projects would not promote, but defeat, the accommodation of federal and state interests. It would allow the States unilaterally to upset the accommodation already reached through the extended process of

and holding in *Arizona* v. *California* (Br. 10–11), candidly asks the Court to "purge the error" of these decisions (*id.* at 12).

federal-state consultation and coordination that has taken place both before and after congressional authorization of the project. Finally, a review of these conditions shows how the comprehensive and integrated nature of a federal reclamation project leaves no room for any control by the States, of the kind these conditions seek to establish, over the construction or operation of the project or over the choices that must be made among the uses and purposes the project will serve.[36]

A. CONDITIONS PRECLUDING FULL IMPOUNDMENT OF THE RESERVOIR

The conditions in Decision 1422 that most seriously impair the project purposes are Conditions 1 and 2, which preclude full impoundment of the New Melones reservoir until the Bureau of Reclamation is able to persuade the state Board that such impoundment is desirable.

1. THE PROJECT PURPOSES

The reservoir capacity of the New Melones Project as originally authorized in the Flood Control Act of 1944 was 450,000 acre-feet, with a provision for possible enlargement to 1,100,000 acre feet (see Project Document, at 3). A primary purpose of the 1962 reauthorization was to expand the reservoir capacity to 2,400,000 acre feet. As stated in the project report

[36] The conditions imposed in Decision 1422 are not unique. Another example is provided by the conditions imposed by the California Board in Decision 1379, which are described in the brief of *amici* Friant Water Users Association, *et al.*

submitted to Congress by the Acting Chief of Engineers (Project Document, at 1):

> The District and Division Engineers find, after joint studies with the Bureau of Reclamation, that the New Melones Project, to provide a gross storage capacity of about 2,400,000 acre-feet and a hydroelectric development of approximately 150,000 kilowatts, is needed for full development and maximum utilization of the water resources of the Stanislaus River basin as well as to provide an adequate degree of flood protection on the Stanislaus and lower San Joaquin Rivers.

The State of California, in its comments submitted to Congress on the Project Report (App. A, *infra,* pp. 1A–27A), not only endorsed the reauthorization of the project basically as described in the Project Report (see *id.* at 25A–27A), but recognized and endorsed specifically the expansion of the reservoir to 2,400,000 acre-feet (see *id.* at 3A). Thus the State concluded (*id.* at 25A):

> 1. Optimum multipurpose development of the New Melones Reservoir site should be made for the purposes of flood control, water conservation, hydroelectric power, recreation, and fish and wildlife. Reservoir storage capacity of 2,400,000 acre-feet as planned in the report, is adequate for these purposes.

In the Flood Control Act of 1962 (76 Stat. 1180), Congress modified the New Melones Project and reauthorized it "substantially in accordance with the recommendations of the Chief of Engineers" in the

project report (76 Stat. 1191). The Act referred specifically to several of the Project's purposes, including irrigation, power, and recreation. Among other things, it directed that upon completion of the dam and powerplant, "the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws" (76 Stat. 1191); it directed the Secretary of the Interior to make "contracts for the sale and delivery of the additional electric energy available from the Central Valley project power system as a result of the construction of the plants herein authorized" (76 Stat. 1191–1192); and it directed the Secretary of the Army to "construct basic public recreation facilities [and] acquire land necessary for that purpose" (76 Stat. 1191).

The Act also provided that plans, specifications, and preliminary work for all projects authorized in the Act, including New Melones, could be funded with subsequent flood control appropriations "so as to be ready for rapid inauguration of a construction program." And it directed that all the projects "shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements." 76 Stat. 1180.

2. THE BOARD'S CONDITIONS

Conditions 1 and 2 imposed by the Board in Decision 1422 (A. II, 33–34) restrict the uses and limit the amounts of project water, prohibiting full impoundment of the reservoir until such time as the

Bureau persuades the Board that that impoundment is desirable.

Condition 1(a) deals with an application by the Bureau to appropriate water "for irrigation, domestic, municipal, industrial, fish culture, recreation and water quality control purposes" (A. II, 9). The Board grants the requested amount but only for the purposes of fish and wildlife, recreation, and water quality (A. II, 33)—banning use of this water, until further order of the Board, for the project purposes of irrigation and domestic, municipal, and industrial consumption, purposes that Congress sought to promote by providing that the New Melones Project would be fully integrated with the Central Valley Project.[37]

Conditions 1(b) and 1(c) (A. II, 33–34) allow the requested purpose, which is power generation, but substantially reduce the quantities of water that may be appropriated and hence the amount of power that can be generated (and funds returned to the government) by the project.[38]

Condition 1(d), like condition *1(a)*, deals with an application to appropriate water—to the full reservoir capacity of 2,400,000 acre feet annually—for the purposes of irrigation, domestic, municipal, and industrial consumption, fish, recreation, and water quality control (A. II, 9). It limits the permit to 1,420,000 acre feet and, like Condition 1(a), limits the permissible uses, until further order of the Board, to fish and wildlife, recreation, and water quality control (A. II, 34). Once again, purposes intended by Congress would not be permitted by the Board, while the intended quantity of unappropriated water would also be denied.

Condition 2 limits impoundment of the reservoir to only so much water as is necessary to provide releases of 98,000 acre-feet annually, which releases are limited to the purpose of preserving and enhancing fish and wildlife, plus such additional releases as are specified by Condition 5 for the purpose of maintaining water quality (A. II, 34) (see pp. 70–75, *infra*). The Condition provides: "No additional impoundment shall be allowed for power and recreational purposes" (*ibid.*). No impoundment for new irrigation is authorized, either.[39] Additional impoundment will be authorized only on "[f]urther order of the Board," which

> * * * shall be preceded by a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the

[37] See the affidavit submitted to the district court by John R. Morgan, chief of the Bureau of Reclamation division responsible for planning the New Melones Project (A. II, 135, 136–137).

[38] *Condition 1(b)* reduces the quantity of water sought by more than 25 percent (compare A. II, 8–9, with A. II, 33). *Condition 1(c)* deals with an application to fill the reservoir—that is, appropriate 2,400,000 acre feet annually by storage—for power generation (A. II, 9). It limits the amount to 1,420,000 acre feet annually (A. II, 33–34).

[39] Condition 2 does permit impoundment to satisfy "prior rights at existing Melones Reservoir" (*ibid.*), including irrigation, and for flood control (A. II, 34).

watershed above New Melones Dam and that the permitee has firm commitments to deliver water for such other purposes. [A. II, 34.]

3. THE CONDITIONS VERSUS THE PURPOSES

These conditions reflect the Board's determination that the recreational uses of the proposed reservoir would not adequately substitute for the loss of white water rafting and stream fishing in the existing stretch of the river (A. II, 27–29; see p. 10, *supra*), and that the benefits of power production would not outweigh this loss (A. II, 27–28, 32; see pp. 11–12, *supra*). Although the Board found that production of power would be a "[b]eneficial use of project water" (*id.* at 32), and estimated the value of the power benefits of the proposed project as $5.5 million per year (A. II, 27), it concluded that:

> • • • preservation of the existing upstream reach of the river for recreation values conflicts with increased storage for power purposes. Therefore, storage for power generation should be approved, but limited to the amount authorized for other project purposes. [*Id.* at 32.]

These conditions are inconsistent with the project plan, as reauthorized by Congress after endorsement by California, for a reservoir of 2,400,000 acre feet. They are inconsistent with the project's purposes, specifically reflected in the 1962 Act, of providing irrigation, power, and new recreation facilities. In general, they interfere with the functions of the project—principally irrigation and power—that would

otherwise bring in revenues to offset the project costs. As one law review commentator has observed:

> If congressional authorization requires that the New Melones Dam be built as planned, then D 1422 cannot be enforced without destroying the economic feasibility of the project. There is no way that the irrigation and power purposes of New Melones can be achieved if the conditions of D 1422 remain unchanged. [40]

The State's unilateral restriction of the revenue-producing features of the Project warrants special note in view of the recent publication of an Interior Department audit of the Central Valley Project which concludes that the Project is "in serious financial trouble." [41]

Petitioners stress that Conditions 1 and 2 only "defer" full impoundment of the reservoir (Br. 7, 8, 10, 67). They assert that "[n]othing in federal law"—as distinguished from "a federal administrative decision" (Br. 68)—requires that project waters be fully, and immediately, impounded • • •" (Br. 68). The 1962 authorizing Act states, however, that New Melones and the other projects authorized "shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements" (76 Stat. 1180). Conditions 1 and 2 impair this congressional purpose in two ways. They delay the ex-

[40] Comment, *Allocation of Water from Federal Reclamation Projects: Can the States Decide?* 4 Ecology L.Q. 343, 373 (1974).

[41] United States Department of the Interior, Office of Audit and Investigation, *Review of the Central Valley Project, Bureau of Reclamation* (January 1978).

peditious realization of the project that Congress directed, and at the same time they aggravate the "budgetary requirements" by preventing the completed project from generating its full complement of revenues.

Moreover, Condition 2 subjects every future Bureau request to impound additional water to the same discretionary jurisdiction and balancing test of the Board."[42] The Board can continue to determine that the damage to fish, wildlife, and particular forms of recreation outweighs the benefits of proposed project uses (including irrigation), even in cases where the Board finds that the Bureau has "firm commitments" to deliver project water for those uses (see A. II, 34). It would be the state Board's view of "the public interest" that determined whether purposes for which Congress had authorized and the federal government had constructed this project, with the approval of California, would be allowed to go forward. Such conditions are inconsistent, not only with the congressionally authorized purposes of the New Melones Project, but with its very nature as a project funded, constructed, and operated by the federal government."[43]

[42] "[T]he specific intended use must be evaluated and found to be reasonable, beneficial and *in the public interest* before a permit can issue. The Board undertakes a balancing of competing demands and policy considerations and has broad discretion." Decision 1422, A. II, 21 (emphasis in original).

[43] Petitioners rely (Br. 10 and n. 12) on a statement from the United States' Brief in Opposition filed in April 1974 in *Environmental Defense Fund, Inc.* v. *Armstrong*, 487 F. 2d 814 (C.A. 9), certiorari denied *sub nom. Environmental Defense Fund, Inc.* v. *Stamm*, 416 U.S. 974 (No. 73-1179), stating that Decision 1422

B. CONDITIONS LIMITING OR CONTROLLING THE USE OF PROJECT WATER

1. CONDITIONS 4 AND 25

(a) *The conditions. Condition 4* (A. II, 35) provides that project water may be used for consumptive purposes only in four named counties (Stanislaus, Calaveras, Tuolumne and San Joaquin). It further states that the Board will consider amending the permits to authorize consumptive use elsewhere only on a showing "that water from other [Central Valley

"does not render the project useless or fundamentally alter its value." *Armstrong* was a suit challenging the adequacy of the Bureau's environmental impact statement for the New Melones project. Our primary submission in the Brief in Opposition was that the courts below had correctly found the statement adequate. We also argued that the trial court had not erred in deferring consideration of the effect of Decision 1422 pending the outcome of this litigation challenging that decision, and it was in connection with this argument that the quoted statement was made. We urged that Decision 1422 was "not relevant" to *Armstrong*, first, because we were challenging the Decision as invalid, and second, because the Decision "does not render the project useless or fundamentally alter its value" (Br. 10).

After closer review of Decision 1422 in this case, we no longer believe it is correct to say that the Decision does not "fundamentally alter" the value of the New Melones project, although imposition of the conditions set forth in the Decision would not render the project "useless." Similar judgments have been expressed by federal officials concerned with the project since 1974, subsequent to the filing of the Brief in Opposition in *Armstrong*. See the letter dated August 29, 1974, from the Commissioner of Reclamation to the Governor of California, stating that the restrictions imposed in Decision 1422 "seriously impair the authorized project purposes" (A. II, 132); the affidavit of John R. Morgan dated October 11, 1974 (A. II, 135, 136); and the affidavit of J. Robert Hammond dated October 11, 1974 (A. II, 146).

Project] sources is not available to serve such areas," and that any such use that may later be authorized outside the four counties "shall be subordinate" to use within those counties and "shall terminate" when the water is needed within those counties (*ibid.*). *Condition 25* (A. II, 40) prohibits the use of project water "outside the counties of origin" if the water "is necessary for the development of [those] counties." (The "counties of origin" referred to in Condition 25 are apparently the same four counties for which a preference is required by Condition 4. See Pet. Br. 6 n. 5.)

(b) *The project purposes.* The 1962 authorizing Act directs that the New Melones project "shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws," with the proviso that "before initiating any diversions of water from the Stanislaus River Basin in connection with the operation of the Central Valley project, the Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin and the diversions shall at all times be subordinate to the quantities so determined" (76 Stat. 1191). Petitioners contend (Br. 6 and n. 5) that Conditions 4 and 25 "echo" this proviso of the Act.

(c) *The conditions versus the purposes.* Conditions 4 and 25 are not consistent with the Act. Under Condition 4, even if the water needs of the Board's four

preferred counties were determined to be met, consumptive use of project water outside those counties still would not be authorized by the Board unless it was shown "that water from other CVP sources is not available to serve such areas" (A. II, 35). This stipulation not only has no counterpart in the Act, but it countermands the Act's directive that the New Melones Project become an integral part of the Central Valley Project and be operated by the Secretary of the Interior to fulfill the purposes of the federal reclamation laws. Those purposes include meeting agricultural, municipal, and industrial needs within the service areas of the Central Valley Project, after the needs of the Stanislaus River Basin have been met in accordance with the Act's proviso.

Nor do these conditions "echo" that proviso. The proviso requires the Secretary of the Interior—not the state Board—to "determine the quantity of water required to satisfy all existing and anticipated future needs" of the "Stanislaus River Basin" (76 Stat. 1191). Condition 4 would have the state Board determine whether the water is needed for "beneficial use" within the four counties. And Condition 25 would condition any use of the water outside those counties on the even broader determination, also to be made by the state Board, of whether the water is "necessary for the development of the counties." The conditions thus would give the state Board the operating and allocative control over project water which

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the authorizing Act places in the Secretary of the Interior."

2. CONDITIONS 5 AND 20

[A] CONDITION 5 AND THE BUREAU'S WATER-QUALITY AGREEMENT

Condition 5 (A. II, 35–36) also limits the use of project water, subjecting that use to state standards of water quality control. Condition 5 requires that releases of water from the New Melones Reservoir for purposes of water quality control be scheduled so as to preserve a mean monthly concentration of dissolved solids of not more than 500 parts per million at a point in the San Joaquin River, and a dissolved oxygen concentration in the Stanislaus River as specified in the state Board's interim water quality control plan (A. II, 35). It further provides that if the interim plan is amended or superseded, "the foregoing water quality objectives shall be modified to conform to then current criteria" (*id.* at 35–36).

The 1962 authorizing Act provides that the Secretary of the Army is to consider "the advisability of including storage for the regulation of streamflow for the purpose of downstream water quality control" (76 Stat. 1192). Pursuant to this provision, cooperative studies of water quality requirements in the Stanislaus River were undertaken by the Public Health Service, the Bureau of Reclamation, and the Corps of Engineers, "demonstrating the feasibility of adding water quality control as a function of the New Melones Project" (A. II, 149). As a result, in 1969 an agreement was reached, and a "Memorandum of Agreement" signed, between the Bureau and the Central Valley Regional Water Quality Control Board, concerning the water quality functions and standards for the New Melones Project (A. II, 148–151).[45] It is this agreement to which petitioners refer when they state that Condition 5 "reaffirm[s] [the Bureau's] contractual obligations" arising from "an agreement between the Bureau and California agencies" (Br. 6 and n. 6; see also *id.* at 67, n. 48).

In fact, the obligations imposed on the Bureau by Condition 5 are not those of the agreement but

"Moreover, contrary to petitioners' implication (Br. 6, n. 5), the "Stanislaus River Basin," whose water needs are given preference by the Act, is not necessarily coterminous with the four counties that are named in Condition 4 and that reappear as the "counties of origin" in Condition 25. See A. II, 143 (Morgan affidavit). See also the Board's own statement (A. II, 21) that "[t]hese four counties include substantial areas in the Stanislaus River basin * * *." The Stanislaus River Basin is not defined in the 1962 Act or its legislative history (including the Project Document), and the Secretary of the Interior is now considering recommendations, formulated after a series of public hearings held in Stanislaus, Calaveras, Tuolumne and San Joaquin counties between December 15 and December 19, 1975, concerning the proper definition of the basin. The Secretary must define the basin in order to proceed with his task of determining the existing and future water needs "within that basin" (76 Stat. 1191), after which he is directed by the Act to use the remaining water in such a way as best to meet the needs of the integrated Central Valley Project (*ibid.*). Conditions 4 and 25 would supplant such determinations by the Secretary with different determinations by the state Board. Cf. the "county of origin" claim that was rejected in *City of Fresno* v. *California*, 372 U.S. 627; see pp. 45–46, *supra*.

[45] The proposed water quality releases were also reported to Congress in conformity with the authorizing Act (A. II, 139, 140 (Morgan affidavit)).

reflect a one-sided rewriting of the agreement by the state Board. While the agreement did state the total-dissolved-solids concentration of not more than 500 parts per million as an "objective" of the Bureau's water-quality releases from New Melones (A. II, 150), the agreement included two basic limitations on the water-quality obligations that the Bureau was assuming. First, it limited to 70,000 acre-feet per year the amount of water the Bureau agreed to release from the New Melones Dam for the purpose of water quality control (A. II, 150). Second, it provided that "if hydrologic or other conditions prevent maintenance" of the specified total-dissolved-solids concentration "on a mean monthly basis during the entire year," then "operational releases of the water quality reservation will be restricted to the irrigation season in accordance with irrigationists' needs" (A. II, 150).

The Board in Decision 1422 discussed these terms of the agreement and rejected them (A. II, 17–19). Stating that "the ability of the agreed-upon releases to accomplish the water quality objectives depends upon [certain assumptions]," that "[t]hese assumptions may not be valid," and that "[t]here was considerable evidence presented at the hearing as to what are proper water quality objectives" (A. II, 18), the Board disapproved the limitations that the agreement imposed on the amounts of water that the Bureau agreed to release from New Melones for water-quality purposes. Instead of adopting the agreement,[46]

[46] Compare the Board's Condition 24 (A. II, 40), making the permits subject to other agreements between the Bureau and California agencies.

the Board decided that "any permits issued pursuant to [the Bureau's] applications should contain an interim term until further studies are made requiring releases of conserved water from New Melones which will maintain [certain concentrations of solids and oxygen] * * * as specified in the Interim Water Quality Control Plan. The Board should reserve jurisdiction over the permits for the purposes of revising water release requirements for water quality objectives." A. II, 19; accord, Condition 5, A. II, 35–36."

By Condition 5 the Board would thus impose on the project water-quality obligations which, far from representing an accommodation of state and federal interests, repudiate the contract reached and signed on this subject by the Bureau and the State's regional water quality control board. The Board adopts one of the "obligations" that the Bureau agreed to in that contract but rejects the limitations on that obligation embodied in the same contract. Those limitations, moreover, were important to the project. Without such limitations on the amounts of water that must be re-

[47] Petitioners state that Condition 5 "reaffirm[s] contractual obligations voluntarily incurred by the Bureau" (Br. 67 n. 48; see also Br. 6 and n. 6). Petitioners neglect to state that it does so while dropping the conditions that limited those "obligations" in the contract. Without those conditions, the Board would not have "voluntarily incurred" the obligations. In addition, whatever obligations the Bureau had under the contract were fixed. There was nothing in the contract (see A. II, 148–151) resembling the provision in Condition 5 tying the Bureau's obligations to future changes in the Board's interim water quality control plan (A. II, 35–36), or resembling the even more open-ended provision of Condition 20 (A. II, 39; see pp. 74–75; *infra*).

leased for water quality purposes, required releases for this purpose could prevent the project from adequately serving its various other purposes (such as irrigation, to which one of the limitations in the agreement was expressly tied (A. II, 150)). Indeed, Condition 5 would permit taking up to the full yield of New Melones for water-quality purposes if the Board determined that this was appropriate (A. II, 35–36; see A. II, 139 (Morgan affidavit)).

(B) CONDITION 20

Condition 20 (A. II, 39) complements and expands on Condition 5. It reserves to the Board authority to modify the quantity of water diverted by the Project if "the Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified" under state law (A. II, 39). This open-ended condition would permit the Board, on the basis of any water quality control plan that might subsequently be established,[48] to determine that any portion of the yield of the New Melones Project—up to and including the total amount—must be used for water quality purposes. "With such po-

[48] The Board itself has jurisdiction to formulate and adopt state policy for water quality control (California Water Code § 13140 West 1971), to approve water quality control plans adopted by regional boards (*id.* at § 13245 (1977 Cum. Supp.)), and to adopt its own water quality control plans (*id.* at § 13170 (1977 Cum. Supp.)) for waters for which water quality standards are required by the Federal Water Pollution Control Act (86 Stat. 816, 33 U.S.C. 1251 *et seq.*).

tential for a required operational change, the Bureau could not effectively plan nor control the operation of the project" (A. II, 145 (Morgan affidavit)). The required use for water quality could override the project's commitments to meet other needs and purposes for which it was authorized by Congress (including the need for financial integrity), and could override the contrary decisions made by the Secretary pursuant to the authority delegated to him by the Congress.

It bears emphasis that the Secretary here has entered into a specific, formal agreement with a state agency, the Central Valley Regional Water Quality Control Board, concerning the water quality functions of this federal project (A. II, 148–151). Yet the state Board, by Decision 1422 and the attached conditions, would override that agreement and unilaterally impose its own, more stringent water-quality requirements on the project, reserving jurisdiction to make those requirements even stricter. These circumstances illustrate the difference between the state-federal coordination that is actually involved in the reclamation program and the nature of the power that petitioners claim here.

C. CONDITIONS RESERVING THE BOARD'S JURISDICTION OVER THE OPERATION OF THE PROJECT

A number of other conditions reserve to the state Board continuing jurisdiction to restrict the project's impoundment of water, alter release requirements, and otherwise control the project's operation.

1. CONDITION 9: FUTURE CHANGES IN AMOUNTS OF WATER

Condition 9 (A. II, 36) says simply: "The maximum quantities stated herein may be reduced in the license if investigation warrants" (A. II, 36). It thereby leaves to the Board's discretion the amount of water that may be stored and used in the future to fulfill the purposes of the project.

2. CONDITION 13: AUTHORITY OVER OPERATING METHODS

Condition 13 (A. II, 37) reserves authority in the Board to regulate matters such as "method of diversion, method of use, and quantity of water diverted," so as "in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water." The exercise of this authority by the Board, and in particular the adoption of measures such as those specifically suggested in Condition 13,[*] would go far toward establishing that it was the Board, not the Bureau, that was operating and maintaining the project (and requiring expenditures to be made for it). The

[*] The condition states (A. II, 37) that in order to meet the quoted objectives, the Bureau "may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (3) suppressing evaporation losses from water surfaces; (4) controlling phreatophytic growth; and (5) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project."

1962 authorizing Act states, in contrast, that except for the flood control aspects (which are subject to rules and regulations prescribed by the Secretary of the Army), the project was to be "operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws" (76 Stat. 1191).

3. CONDITION 6 AND "FISH RELEASES"

Condition 6 (A. II, 36) reserves jurisdiction for the purposes of establishing "dry year criteria" and of "revising water release requirements for water quality objectives and fish releases," pursuant to further studies. The question of water quality releases has already been discussed in connection with Condition 5 (pp. 70–74, *supra*).

So far as "fish releases" are concerned, they are purportedly regulated not only by Condition 6 but by *Condition 2* (A. II, 34), which specifies the amount of water that may be impounded for fish and wildlife purposes and states that this water is "to be released at a rate specified by the California Department of Fish and Game" (A. II, 34).

The 1962 Act directed the Secretary of the Army, not the state Board, to "adopt appropriate measures to insure the preservation and propagation of fish and wildlife in the New Melones project • • •" (76 Stat. 1191). There was extensive consultation and agreement between federal and state officials on the subject of fish and wildlife, and fish releases in par-

ticular. The California Department of Fish and Game submitted to Congress extensive comments on the project report (App. A, *infra*, pp. 17A–23A), and the Corps of Engineers stated in response that it had agreed to recommendations of the Fish and Wildlife Service for downstream fish releases which were consistent with the recommendations of the California Department (Project Document, at xxxiv)."[80]

In general, if the state Board has the authority asserted in Condition 6 to regulate water releases for selected purposes, all the purposes of the project that are dependent on water are affected, and there is no way for federal authorities to assure that those purposes are realized as Congress intended (see A. II, 143 (Morgan affidavit)). Again, the result is to transfer operating control of the project from the federal government to the state Board.

D. CONDITIONS AFFECTING CONSTRUCTION AND DESIGN OF THE PROJECT

The 1962 authorizing Act authorizes the Corps of Engineers to construct the New Melones Project, substantially in accordance with the plans set forth in the Project Document (76 Stat. 1191). Yet a number of the conditions attached to Decision 1422 would extend

[80] See also the affidavit of Bureau official John R. Morgan, stating: "The project fish releases were previously studied and agreed upon by the State Department of Fish and Game, the U.S. Bureau of Sport Fisheries and Wildlife, and the Bureau of Reclamation" (A. II, 140).

the control of the state Board to the construction and design of the project.

Conditions 10 and 11 set construction deadlines, as if the state Board were financing and building the project: "Construction work shall be completed on or before December 1, 1980" (Condition 10), and "Complete application of water to the uses authorized by the permit shall be made on or before December 1, 1990" (Condition 11) (A. II, 36).

Condition 17 requires that the Bureau "install and maintain an outlet pipe of adequate capacity in [the] dam as near as practicable to the bottom of the natural stream channel, or provide other means satisfactory to the [Board], in order that water entering the reservoir which is not authorized for appropriation under this permit may be released" (A. II, 38).

This additional outlet pipe is not included in the project designs and would be structurally inconsistent with the project's proposed method for releasing stored water, thereby imposing "considerable additional costs and operational constraints on the project," as pointed out in the affidavit of Bureau official John Morgan (A. II, 144). Petitioners justify this condition as requiring the Bureau "to provide means for the release of excess waters" (Br. 7 n. 9). But what the condition requires is a particular, structural "means" specified by the Board, or some "other means satisfactory to the [Board]" (see A. II, 142 (Morgan affidavit)).

Condition 18 requires the Bureau to "clear the site of the reservoir of all structures, trees, and other vegetation" that would interfere with storage or recreation, except for "vegetation cover in selected areas as required for the protection of wildlife" (A. II, 38). It also requires that clearing operations "be coordinated with authorized increases in storage levels" (*ibid.*). Together with *Condition 3*, which requires the Bureau to file with the Board a "proposed reservoir clearing plan" (A. II, 35), Condition 18 appears to require a staged clearing process, which would be contrary to the plan developed by the Corps of Engineers for "overall clearing" during project construction (see A. II, 138, 143 (Morgan affidavit)).

E. CONDITIONS IMPOSING REPORTING REQUIREMENTS

Other permit conditions impose on the Bureau extensive reporting requirements that are apparently designed to enable the Board to exercise continuing control over the project. These conditions require the Bureau to keep numerous records and prepare a variety of reports, none of them authorized by Congress and none of them carrying congressional appropriations—not to mention State appropriations—to pay for them (see A. II, 140).[51]

[51] The required reports include: (1) "a reservoir operation study showing the water level elevations required to provide [specified] yield," including details of the "proposed reservoir clearing plan," and a "reservoir operation schedule" which "shall be subject to approval of the Board" (*Condition 3*, *id.* at 34–35); (2) biennial reports of water diversions and use showing "which diversions may be encroaching on the water supply provided for preservation and enhancement of fish and wildlife and for water quality control," as well as "what steps, if any, permittee is taking to prevent any such encroachment" (*Condition 7*, *id.* at 36); (3) an annual report showing the daily storage level in the reservoir and the daily water quality (*Condition 8*, *ibid.*); (4) "[p]rogress reports" to be submitted "when requested by the State Water Resources Control Board until [a] license is issued" (*Condition 12*, *ibid.*).

In addition, *Condition 22* (A. II, 39) provides that "[b]efore making any change in the project determined by the [Board] to be substantial, [the Bureau] shall submit such change to the Board for its approval * * *."

This condition purports to place in the state Board the authority to approve, and hence control, any of the many changes that might be called "substantial" which are inevitable in the course of the planning, construction, implementation, and operation of such a large project. The power to control "substantial changes" in such a project is the power to control the project, a power that Congress gave in the 1962 Act not to the state Board but to the Secretary of the Army and the Secretary of the Interior. Moreover, truly substantial changes in the project must be approved by Congress (see 76 Stat. 1180, 1191). With respect to these changes the Board's requirement would not only create duplication and confusion, but would bypass the established processes for state input into congressional authorization decisions on reclamation projects.

F. CONDITIONS REQUIRING ACCESS TO THE PROJECT

Finally, two conditions require the Bureau to provide certain persons with access to the project.

Condition 15 requires the Bureau to allow representatives of the Board, "and other parties, as may be authorized from time to time by said Board," reasonable access to the project works to determine compliance with the permit conditions (A. II, 37–38).

As pointed out in the affidavit of Bureau official Morgan (A. II, 142), this condition not only "has the effect of again placing the project operation under the Board's control rather than under the Secretary of the Interior in accordance with the authorization," but it would also "compromise the Secretary's responsibility for the security of Federal works."

Condition 16 (A. II, 38) requires the Bureau to allow the public "reasonable right of access to the waters impounded by the dam * * * for the taking of fish subject to the regulations of the [State] Fish and Game Commission." If this provision vests in the Board the authority to determine whether access provided by the Bureau is "reasonable," it again trenches on the authority to operate and maintain the project which Congress gave to the Secretary of the Interior.

G. CONCLUSION

The foregoing review of the conditions attached to Decision 1422 has necessarily been extensive because the conditions are. Examined either individually or

in their cumulative impact, the conditions contradict petitioners' claim that they are "fully consistent with the congressionally-authorized purposes of the project" and that, with the admitted exception of the ban on fully impounding the reservoir, they "do not substantially affect the Bureau's plans to acquire and use water for the project" (Br. 67 and n. 48; see *id.* at 67–68).

With respect to "the congressionally-authorized purposes of the project," the conditions are inconsistent with the provisions of the 1962 Act that New Melones shall become an integral part of the Central Valley Project and serve the needs of that project (except to the extent that the Secretary of the Interior determines that the water is required for the existing and future needs of the "Stanislaus River Basin") (76 Stat. 1191). Specifically, by limiting the project's power output, the conditions undermine the Act's provision for "the sale and delivery of the additional electric energy available from the Central Valley project power system as a result of the construction of the plants herein authorized and their integration with that system" (76 Stat. 1191–1192).

The conditions interfere with the Act's directives to the Secretary of the Army to adopt measures for fish and wildlife preservation and construction of public recreation facilities and to consider providing for downstream water quality control (76 Stat. 1191, 1192). They are inconsistent with the decisions of Congress, stated in the Act, that the project shall be

constructed by the Corps of Engineers and then "operated and maintained by the Secretary of the Interior" (76 Stat. 1191).

By prohibiting full impoundment of the reservoir until the Board approves, the conditions flout the congressional directive that the project "be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements" (76 Stat. 1180).

In addition, the conditions are inconsistent with various decisions made by the Secretary of the Army and the Secretary of the Interior pursuant to the authority Congress granted them to construct and operate the project. Petitioners admit that the conditions conflict with the Bureau's decision to fully impound the reservoir in accordance with the Project Document, but find it permissible that "state law conflicts only with a federal administrative decision" (Br. 68). Petitioners cite no authority for this proposition, and there is none. Since the Bureau's decision to fully impound the reservoir has been made pursuant to the authority granted it by Congress, an inconsistent decision of a state administrative Board—or even of a state legislature, if that were the case—must give way to the supremacy of federal law. See, *e.g., Free* v. *Bland,* 369 U.S. 663, 668.

The decisions shaping the New Melones Project that the state Board seeks to undo were not only made by Congress and the authorized federal agencies; they were also made by the State of California, through its participation in the planning of the proj-

ect both before and after the 1962 authorizing Act. California endorsed the project report on which the authorization was based (see App. A, *infra,* pp. 1A–27A), and there has been extensive federal-state coordination since 1962 on specifics of the project. The state Board now seeks, unilaterally, to redesign the operations of the project. This attempt is shown most clearly by the matter of water quality control, where Decision 1422 would repudiate and rewrite an agreement negotiated and signed between the federal Bureau and a state regional water quality control board (A. II, 148–151).

There is a final conclusion to be drawn from reviewing the conditions of Decision 1422. We have examined most of the conditions individually to show how each is inconsistent with the federal purposes of this project. But the very process of individual examination, through its laboriousness, its necessary descent to the level of operational detail, and its need to specify project purposes out of a massive process of planning and authorization, demonstrates that such a comparison of federal and state specifications for a complex reclamation project is not an appropriate task to be imposed on the courts and undertaken as a matter of law.[52]

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[52] Such is the task proposed by Dean Meyers as *amicus* (Br. 12–15). Its nature is suggested by petitioners' statement (Br. 40 n. 30): "We do not assert the right, of course, to 'dictate' the daily operation of a project or changes in authorized uses, except to the extent related to the 'beneficial' and 'reasonable' use of water and not inconsistent with specific federal reclamation laws or congressionally-authorized project purposes."

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The district court recognized as much by declining to consider whether the conditions of Decision 1422 "do in fact alter or conflict with the purposes of the New Melones Project" (A. I, 93). The court held that such an inquiry was "not material," because the state Board simply lacked authority "in regard to the construction and operation of federal reclamation projects," except with respect to the determination of the availability of unappropriated water (*ibid.*).

Both the comprehensiveness and the detail of the federal involvement in a project of this kind, and the corresponding breadth and depth of a judicial inquiry into the consistency or inconsistency of attempted state involvement, compel the conclusion that federal authority has occupied the field with respect to the project's planning and operation. There are established modes of state participation, but there is no room for unilateral state control of the kind asserted in Decision 1422.

III

FEDERAL LEGISLATION LEAVES NO ROOM FOR STATE CONTROLS OVER THE OPERATION OF FEDERAL RECLAMATION PROJECTS OR THE ALLOCATION OF THEIR WATERS AMONG COMPETING USES

Petitioners recognize that "where Congress has acted, the states cannot act differently" (Br. 59). They recognize that the States must defer to "the specific laws and policies established by Congress, including the purposes of its individual projects" (Br. 59). But petitioners would require these laws and

policies to be "specific" indeed. And they would require Congress itself, in the text of legislation, to set forth the specifics.

"If Congress provides that a project shall impound a specific quantity of water," a State cannot require otherwise, petitioners acknowledge (Br. 59). But Congress may not achieve this result, in their view, by approving a project report that "describes the amount of water to be impounded by the project" (Br. 60 n. 44) and delegating to the Secretary of the Interior the authority to operate and maintain the project (76 Stat. 1191). For the specific decision on when to impound the water would then be made by "a federal agency that is answerable to no one except, in an abstract sense, to Congress" (Br. 61).[53] The contrary decision of the state Board should prevail (Br. 68).

Similarly, even though Congress does state in an authorizing Act that one of the purposes of a project is power generation—as it stated with respect to the New Melones Project (76 Stat. 1191–1192; Br. 60 n. 44)—a decision of the state Board substantially reducing the amount of power that the project can generate (see pp. 61–66, *supra*) does not "impair those purposes" (Br. 59).

There are a number of reasons why petitioners' theory should be rejected by the Court.[54] Two have

[53] While petitioners distinguish sharply between Congress and a federal administrative agency, they equate the permit conditions imposed by the state Board with "the states' appropriation laws" (Br. 58).

[54] Many of the reasons noted here, as well as others, are admirably presented in the *amicus curiae* brief of the Pyramid Lake Paiute Tribe of Indians, at 6–31.

already been noted. However attractive the theory might sound in its abstract presentation, the 25 conditions imposed by Decision 1422 demonstrate, as we have shown at length in Part II (pp. 57–86, *supra*), that the control being asserted by the state Board in this case is not consistent with the congressional purposes of the New Melones Project. Second, petitioners' "suggested approach" (Br. 63) conflicts with this Court's interpretations of Section 8 in the *Arizona* v. *California,*[55] *City of Fresno,*[56] and *Ivanhoe*[57] decisions. If the approach nonetheless "results in a sound policy of water management," as petitioners contend (Br. 63),[58] that policy is for Congress to adopt.

In the following pages we will discuss three other reasons why there is no room, under existing law, for the kind of state controls over federal reclamation projects that petitioners would establish. First, Congress has occupied the field by expressing, both in the 1902 Reclamation Act and in a long line of succeeding statutes applicable to federal reclamation projects, a broad variety of substantive and procedural policies and administrative delegations that preclude a unilateral and mandatory state intervention. Second, there already exists, by virtue both of congressional legislation and of long-established practice, a

[55] 373 U.S. 546, 586–587; see pp. 47–50, *supra.*
[56] 372 U.S. 627; see pp. 45–46, *supra.*
[57] 357 U.S. 275, 291–292; see pp. 41–45, *supra.*
[58] See also the brief of Dean Meyers as *amicus* at 13–14.

powerful voice for the States with respect to the planning, construction, and operation of reclamation projects. If the existing modes of state participation should be replaced with the kind of unilateral power that petitioners contend for, that is a change in the legislative scheme that is for Congress to consider. Third, Congress has expressed a particular desire for federal reclamation projects to be subject to unitary management and has committed that management to the Secretary of the Interior. This commitment likewise precludes the unilateral control that petitioners would establish on behalf of the State.

A. CONGRESS IN A SERIES OF ENACTMENTS HAS MADE FEDERAL RECLAMATION PROJECTS SUBJECT TO A VARIETY OF FEDERAL POLICIES THAT LEAVE NO ROOM FOR STATE CONTROLS ON THE OPERATION OF A PROJECT OR ON THE CHOICE OF USES IT WILL SERVE

Petitioners assert that "the Bureau should be required to comply with the states' appropriation laws, including their permit systems, to the extent that such laws are not inconsistent with the specific reclamation laws and policies adopted by Congress" (Br. 58). Congress has, however, adopted such a comprehensive set of reclamation laws and policies that it has left no room for imposition of mandatory state controls or conditions. This conclusion flows from a review of the 1902 Reclamation Act and the line of subsequent congressional enactments, both reclamation laws and broader statutes, that govern federal reclamation projects.

1. RECLAMATION PROJECTS ARE PECULIARLY FEDERAL IN THEIR ORIGIN AND THEIR INTERSTATE ASPECTS

At the outset, two generic aspects of federal reclamation projects stand against the notion of state control. First, the question here is not whether state law is preempted by a federal regulatory scheme, as in *City of Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624. Reclamation projects are direct federal undertakings, financed, constructed, owned, and operated by the federal government. See *Arizona* v. *California, supra,* 373 U.S. at 589. Traditionally, federal installations and facilities are " 'free from regulation by any state.' " *Hancock* v. *Train, supra,* 426 U.S. at 178 (quoting *Mayo* v. *United States,* 319 U.S. 441, 445).

Even where a water project is only licensed by the federal government, a requirement that it secure a state permit as a condition of operation has been struck down because it "easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission, supra,* 328 U.S. at 164; accord, *Federal Power Commission* v. *Oregon,* 349 U.S. 435, 445.

Second, federal reclamation projects often involve interstate streams. If States may unilaterally impose conditions on the storage or use of waters from the project, *which* State's conditions shall govern? The

problem of interstate incongruities was cited to the 1902 Congress as an important reason for a national approach to reclamation.[59] In *Arizona* v. *California, supra,* this Court noted that "[s]ubjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow" (373 U.S. at 590).

To be sure, petitioners note that this case involves "intrastate waters" (Br. 62). But Section 8 cannot be interpreted one way in such a case and differently when "interstate waters" are involved.[60]

2. THE RECLAMATION ACT OF 1902

The train of legislation infusing a variety of congressional policies into the reclamation program begins with the 1902 Act itself. Reading that Act as a whole,[61] one sees that it delegated to the Secretary of the Interior broad and comprehensive authority to

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[59] See the statement of Congressman Mondell, 35 Cong. Rec. 6676, quoted by the district court at A. I, 58–59, and the statement of Congressman Newlands, 35 Cong. Rec. 6734, quoted by the district court at A. I, 62–63.

[60] See *Environmental Defense Fund* v. *East Bay Municipal Utility District,* 142 Cal. Reptr. 904, 910. Petitioners claim that "the state in which the use occurs" has the greatest interest at stake (Br. 62). But the use of reclamation waters may take place at quite a distance, and across state lines, from where the waters originally flow.

[61] See *Richards* v. *United States,* 369 U.S. 1, 11; *Chemehuevi Tribe of Indians* v. *Federal Power Commission,* 420 U.S. 395, 403.

carry out the reclamation program. Section 10 of the Act, 32 Stat. 390, provided:

> * * * [T]he Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

Section 6 of the Act, 32 Stat. 389, provided that "the title to and the management and operation of the reservoirs and the works * * * shall remain in the Government until otherwise provided by Congress." Section 2 of the Act, 32 Stat. 388, authorized the Secretary, without further action by Congress, to make examinations and surveys and to locate and construct irrigation works for the storage, diversion, and development of waters. Section 7 of the Act, 32 Stat. 389–390, authorized the Secretary to acquire necessary rights or property by purchase or condemnation. He was limited only by the requirement in Section 4, 32 Stat. 389, that he first determine that a particular irrigation project was "practicable." [62]

So far as the 1902 Act is concerned, then, the question posed by this case is whether the actual operation

[62] In 1910 Congress provided, however, that no irrigation project could be begun until it was approved by the President. Act of June 25, 1910, 36 Stat. 836. See pp. 104–109, *infra*, for a discussion of the current authorization procedures. Beginning July 1, 1966 specific authorization was required before the Secretary of the Interior could prepare a feasibility report for a reclamation water project. Section 8, Water Project Recreation Act of 1965, 16 U.S.C. 460*l*–19.

of reclamation projects is within the Secretary's authority under Sections 10, 7, 6 and 2 of the Act, or is subject to provisions of state law under Section 8.

3. RECLAMATION LEGISLATION FOLLOWING THE 1902 ACT

In a series of amendments to the 1902 Act, Congress expanded the authority of federal administrative officials and established an expanding list of substantive policies to guide the exercise of this authority. Many of these statutes were enacted over the objections of Western legislators, who contended that the authority granted should be left to the States.[63]

The first significant amendment to the 1902 Act was the Warren Act of 1911, 36 Stat. 925, 43 U.S.C. 523 *et seq.*, which authorized the Secretary of the Interior to contract for the use of surplus waters and for the construction of surplus reservoir capacity in connection with reclamation projects. Section 1 of the Act gave the Secretary power to contract for the delivery of surplus water "upon such terms as he may determine to be just and equitable" and to fix "just and equitable" charges. 43 U.S.C. 523.[64]

[63] Much of the following discussion is based on Sax, *Problems of Federalism in Reclamation Law*, 37 Colo. L. Rev. 49 (1964).

[64] The bill was opposed on the grounds that it would "transfer the jurisdiction now exercised by the State under its laws * * * to the Interior Department," and that it was "an attempt to weld together the Reclamation Service as the master of all the water users in the State." 45 Cong. Rec. 3740, 3744 (1910) (Senator Heyburn). In response, the bill was amended, 45 Cong. Rec. 4316 (1910), by adding the proviso (Section 2, 43 U.S.C. 524): "[t]hat nothing contained in this Act shall be held or construed as

In 1914 Congress passed the Reclamation Extension Act, 38 Stat. 686.[65] Section 8 of this Act, 38 Stat. 688, 43 U.S.C. 440, authorized the Secretary:

> to make general rules and regulations governing the use of water in the irrigation of the lands within any project, and [to] require the reclamation for agricultural purposes and the cultivation of one-fourth the irrigable area under each water-right application or entry within three full irrigation seasons * * * and the cultivation of one-half the irrigable area within five full irrigation seasons * * *.

As one commentator has noted, this provision was significant because it thrust the Secretary "into an area of water law that had traditionally been a matter of state concern—control over the laws dealing with due diligence, relation back and loss of water rights." Sax, *Problems of Federalism in Reclamation Law*, 37 Colo. L. Rev. 49, 72 (1964).

The next major amendment to the reclamation laws was the Act of February 25, 1920, 41 Stat. 451, 43 U.S.C. 521. This Act authorized the supplying of project water for purposes other than irrigation, and again

enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State." The debates reflect an understanding that this proviso failed to satisfy completely the objections to the bill, since it tacitly recognized existing federal authority. See 46 Cong. Rec. 2783 (1911) (Congressman Taylor); 45 Cong. Rec. 4319 (1910) (Senator Heyburn).

[65] Section 9 of the Reclamation Act of 1902 limited its provisions to a 10-year period. 32 Stat. 390.

vested the Secretary with broad discretion.[66] The Act also provided that the Secretary should not enter into such contracts if there were other practicable sources of water for these nonirrigation uses, or if the delivery of water for these purposes would be detrimental to water service for irrigation; it further required him to obtain the approval of the contract by the project's water users' association (*ibid.*). Although a hierarchy of preferences was a basic element of State water law,[67] these provisions created a new federal hierarchy of substantive preferences.

Professor Sax has discussed the significance of the 1920 Act as follows (37 Colo. L. Rev. at 73):

> An examination of the legislative history will show the usual assertions by some Western congressmen that the Secretary was to follow state law and that the reclamation laws are subject to state law, but it is now obvious that these statements do not represent what the Congress as a whole was doing in the reclamation laws. The statutes themselves show a growing

[66] 43 U.S.C. 521 provides: "The Secretary of the Interior in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper * * *."

[67] For example, Kansas recognizes the following "order of preference," Kan. Stat. Ann. § 82a—707(b) (1977): "[d]omestic, municipal, irrigation, industrial, recreational and water power uses." Texas recognizes a somewhat different hierarchy. Tex. Water Code Ann. § 5.024 (1972). See 5 Clark, *Waters and Water Rights* §§ 408.4, 425 (1972).

> body of reclamation law built upon the exercise of federal discretion and with a growing catalogue of substantive federal standards and protections. Likewise the debate on the 1920 Act shows that congressmen from other parts of the country were concerned about utilizing federal standards to decide such questions as whether, under the bill proposed, the irrigation preference in the bill was to permit displacement of established commercial uses by subsequently developing irrigation demands. They were not willing to have either the states or the water users "dictate" reclamation policy to the Secretary or to the Congress. [Footnote omitted.]

The Reclamation Project Act of 1939, 53 Stat. 1187, 43 U.S.C. 485 *et seq.*, was a comprehensive amendment to the reclamation laws designed "* * * to protect the investment of the United States in such projects, and for other purposes * * *." H.R. Rep. No. 995, 76th Cong., 1st Sess. 1 (1939). The Act provides "a feasible and comprehensive plan for the variable payment of construction charges on United States reclamation projects" (*ibid.*), and reaffirms the Secretary's broad general authority, authorizing him "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." Section 15, 43 U.S.C. 485i.

The debates on the 1939 Act disclosed an increasing congressional concern with the federal investment in

reclamation projects.[68] The debates also disclosed what Professor Sax has called "a much more important development which is central to an understanding of modern reclamation law. This development is the congressional interest in utilizing the reclamation laws as an instrumentality for the effectuation of a broad range of other important federal policies." 37 Colo. L. Rev. at 74. Thus, in Section 9(c) of the Act, 43 U.S.C. 485h(c), Congress decided to give a preference for project-produced power to Rural Electrification Act projects. Congressman Robinson explained the reason in words that, as Professor Sax notes (37 Colo. L. Rev. at 74), "perfectly epitomize modern federal reclamation attitudes":

> The bill simply says that any power that is produced on the project shall be first sold * * * to agencies in which the Government is now investing its money. [84 Cong. Rec. 10224 (1939).]

Reflecting this attitude, many acts authorizing individual reclamation projects include provisions express-

[68] Professor Sax writes: "The history of the debates on this Act is full of statements like these: 'Since we are lending hundreds of millions of dollars * * * is there any reason on earth why we should not * * *', or 'The United States Government is investing vast sums of money * * *', 'This bill gives preference * * * and that should be done because the Government is furnishing the money for those projects.' In short, we begin now to see expressed in the Congress the attitude which Mr. Justice Clark stated in the *Ivanhoe* case when he noted that the United States obviously is entitled 'to regulate that which it subsidizes'" 37 Colo. L. Rev. at 74 (footnotes omitted) (citing 84 Cong. Rec. 10222, 10223, 10224 (1939) and *Ivanhoe Irrigation District* v. *McCracken*, *supra*, 357 U.S. at 296).

ing additional congressional policies. For example, provisions designed to discourage the production of certain excess agricultural products, by prohibiting the delivery of project water to newly irrigated lands for the production of those products, are common in recent authorizations.[69]

4. OTHER FEDERAL LEGISLATION APPLICABLE TO RECLAMATION PROJECTS

In the past 20 years Congress has enacted a variety of other laws that apply to reclamation projects, thereby expanding the catalogue of federal policies that reclamation is expected to serve.

The Fish and Wildlife Coordination Act of 1958, 72 Stat. 563, as amended, 16 U.S.C. 661 *et seq.*, requires that before any impoundment of water is proposed or

[69] *E.g.*, Act of October 20, 1972, Section 307, 86 Stat. 968, 43 U.S.C. (Supp. V) 615vvv (Salmon Falls Division, Upper Snake River Project); Act of October 20, 1972, Section 405, 86 Stat. 969, 43 U.S.C. (Supp. V) 615bbbb (O'Neill Unit, Pick-Sloan Missouri Basin Program).

As another example, the Act authorizing the Fryingpan-Arkansas Project directed the Secretary to construct and operate public recreational facilities, "to conserve the scenery, the natural, historic, and archeologic objects and the wildlife on [project] lands," and to provide for such public use and enjoyment of these features "and of the water areas created by this project" as would be consistent with the purposes of the project. Act of August 16, 1962, Section 4(a), 76 Stat. 391, 43 U.S.C. 616c(a).

Another authorizing Act required that the Secretary not operate the project in a manner that would cause the water table available for irrigation or domestic wells in existence prior to construction of the project to drop more than two feet, or in a manner that would cause a reduction in artesian flows. Act of October 20, 1972, section 102, 86 Stat. 964, 43 U.S.C. (Supp. V) 615bbb (Closed Basin Division, San Luis Valley Project).

authorized by a federal agency for any purpose, the agency must consult with the Fish and Wildlife Service of the Department of the Interior with a view to the conservation and development of wildlife resources in connection with the project. The resulting "recommendations of the Secretary of the Interior on the wildlife aspects of such projects" must be submitted to Congress as part of the project report. These recommendations "shall be as specific as is practicable with respect to features recommended for wildlife conservation and development * * *," and the project plan "shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits." Section 2(b), 16 U.S.C. 662(b).

The Federal Water Project Recreation Act of 1965, 79 Stat. 213, 16 U.S.C. 460*l*–12 *et seq.*, provides that whenever a reclamation or other federal water project "can reasonably serve" the purposes of outdoor recreation or fish and wildlife enhancement consistently with the provisions of that Act, "it shall be constructed, operated and maintained accordingly." 16 U.S.C. 460*l*–12.

The Federal Water Pollution Control Act, as added, 86 Stat. 816, 33 U.S.C. (Supp. V) 1251 *et seq.*, as amended by Pub. L. 95–217, 91 Stat. 1566, declares a national policy for the prevention, control and abatement of water pollution. Section 102(b) of the Act, 33 U.S.C. (Supp. V) 1252(b), as amended by Pub. L. 95–217, 91 Stat. 1567, provides that in the planning

of a reservoir the Corps of Engineers and the Bureau of Reclamation shall consider the inclusion of storage for the purpose of regulating streamflow for water quality control, and, with the advice of the Administrator of the Environmental Protection Agency, they are to determine the need for, and value of, storage for this purpose. The Administrator's comments on this question, as well as those of the Bureau or the Corps, are to be submitted to Congress (*ibid.*). The value of storage for this purpose is to be included in the calculation of the economic value of the project, and if the benefits are widespread or national the costs are to be nonreimbursable (*ibid.*).

In addition to the policies Congress has articulated in legislation dealing with water projects, more general federal legislation, setting standards and expressing policies for all federal undertakings, is applicable to reclamation projects. The most important example is the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.* NEPA requires all federal agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement that analyzes the consequences of the proposed action and the available alternatives. Section 102(2)(C), 42 U.S.C. 4332 (2)(C). NEPA also requires, as will be further noted shortly, consultation and cooperation with officials of an affected State. *Ibid.*

NEPA applies, of course, to reclamation projects such as New Melones,[70] and its impact is felt on at least two levels. First, since a proposed reclamation project must seek both an authorization and an appropriation from Congress, the statement required by NEPA serves to make Congress aware of the environmental consequences of the project, the possible alternatives and mitigation measures, and the views of all affected federal, state, and local agencies. Congress then can weigh the various, often competing policies applicable to the proposal and make its decision, resolving inter-governmental conflicts in the process.

Second, the NEPA statement tells the responsible federal officials—particularly the Secretary of the Interior, in the case of a reclamation project—of the environmental impacts, the available alternatives, and the views of other federal agencies and affected States, local governments and concerned citizens and groups. Thus the official also can weigh all the policies applicable to project decisions that are within the limits of his statutory powers, and exercise informed judgment on the decisions that shape the project.[71]

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[70] See *Environmental Defense Fund, Inc.* v. *Armstrong*, 487 F. 2d 814 (C.A. 9), certiorari denied *sub nom. Environmental Defense Fund, Inc.* v. *Stamm*, 416 U.S. 974.

[71] Another important general statute is the Endangered Species Act of 1973, 87 Stat. 892, 16 U.S.C. (1976 ed.) 1531 *et seq.* Its purposes are, among other things, "to provide a program for the conservation of * * * endangered species and threatened species * * *" (Section 2(b), 16 U.S.C. (1976 ed.) 1531(b)). Section 7 of the Act (16 U.S.C. (1976 ed.) 1536) requires the Secretary of the Interior to review all programs he administers and utilize them in furtherance of the Act's purposes; it requires all other federal

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In sum, Congress has established, through the reclamation laws, through Acts authorizing individual reclamation projects, and through general environmental legislation governing federal water projects and all federal undertakings, a broad variety of federal policies that apply to federal reclamation projects. Contrary to petitioners' suggestion (Br. 60, 61), most if not all of these policies are necessarily concerned with the "use of water" by and from the projects.

Even if one looks only at these policies as expressly set forth in congressional enactments, one would have to conclude that their number and pervasiveness leave little room for the assertion of state controls on the operation or uses of a federal reclamation project. For example, if NEPA is to operate as Congress intended, important decisions concerning the impoundment and the uses of water in a project such as New Melones cannot be within the province of a state administrative agency, since they would thus be removed from the province of federal decisionmaking that NEPA contemplated.[72]

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agencies to do the same, in consultation with the Secretary; and it further provides that the Secretary is to make his determinations of critical habitats of endangered or threatened species "after consultation as appropriate with the affected States * * *."

[72] NEPA states (Section 102, 42 U.S.C. 4332): "Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter." The point is well illustrated by the New Melones Project; the state Board's Decision 1422—avowedly based on concerns such as water quality control, fish conservation, energy needs, and preferred forms of recreation—overrides the decisions made by federal officials on the basis of the environmental impact statements for the project that were upheld in *Environmental Defense Fund, Inc.* v. *Armstrong*, 487 F. 2d 814 (C.A. 9), certiorari denied *sub nom. Environmental Defense Fund, Inc.* v. *Stamm*, 416 U.S. 974.

This conclusion becomes inescapable when additional points are considered. One is the particular congressional policy, itself expressed in the enactments, of delegating to the responsible federal official, the Secretary of the Interior, broad authority to operate and maintain the projects pursuant to the applicable statutes. Contrary to petitioners' suggestion (Br. 60), Congress has not left open the question, "Who should fill in these details." Congress has provided that the Secretary should. In addition, Congress has provided for a decision-making process with respect to federal reclamation projects that substantially involves the States. It has provided for a state role of consultation, coordination, and cooperation that cannot be reconciled with the power claimed by the State Board here to assert unilaterally its own mandatory controls over critical decisions concerning the project.

B. CONGRESS HAS PROVIDED FOR FEDERAL CONSULTATION WITH THE STATES IN THE PLANNING OF RECLAMATION PROJECTS INSTEAD OF VESTING THE STATES WITH CONTROL OVER PROJECT OPERATION

Reclamation projects are direct federal undertakings that involve the expenditure of large sums—over $220 million to date for New Melones—and the construction of large facilities that are federally owned

and operated. As Judge Carter suggested in his concurring opinion in the court of appeals (A. I, 35), it would be strange if "Congress provid[ed] that the states, by a permit process, may control the operation of federally constructed, funded, and operated water and power projects."

Congress has responded, however, to the States' desire to have a voice in the formulation of reclamation policy and in the shaping of projects within their borders. It has integrated the States into the process of formulating the policy and especially into the planning of individual projects.

1. FEDERAL STATUTES GIVE THE STATES A ROLE IN PLANNING RECLAMATION PROJECTS

Expressly recognizing the States' interest, Congress in a series of reclamation statutes has required federal consultation and coordination with the States.

For example, Section 1 of the Flood Control Act of 1944, 58 Stat. 888, 33 U.S.C. 701–1, which authorized many reclamation projects, including New Melones, provided:

> * * * [I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized * * *.

To effectuate this policy, the Act required that plans, proposals, or reports for new projects could not be

submitted to Congress unless the investigations on which they were based had been——

> conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. [Section 1(a), 33 U.S.C. 701–1(a).]

The Chief of Engineers was required to submit his proposed report to each affected State, which might submit its views and recommendations in response. *Ibid.* The State's views and recommendations were to be submitted to Congress along with the proposed report. *Ibid.*

Under Section 1(c) of the Act, 33 U.S.C. 701–1(c), the Secretary of the Interior was subject to the same requirements of coordinating his investigations of proposed irrigation projects with the States and submitting his proposed reports to them. Section 1(c) provided that in any case where a submission of views and recommendations by an effected State

> sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress * * *.

Congress has also mandated consultation with state officials regarding specific aspects of reclamation project planning. Thus, Section 2 of the Fish and Wild-

life Coordination Act of 1958 (72 Stat. 564, as amended, 16 U.S.C. 662), see p. 98, *supra,* declares that whenever any federal agency proposes to impound any body of water, the agency must consult not only with the United States Fish and Wildlife Service but also with the "head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources * * * as well as providing for the development and improvement thereof in connection with such water-resource development." Any report prepared by the state agency is to "be made an integral part" of any report submitted to Congress by the federal agency responsible for the construction of the project, and the project reports are to "give full consideration" to the report and recommendations of the state agency (Section 2(b), 16 U.S.C. 662(b).)

The Water Supply Act of 1958 (72 Stat. 319, as amended, 43 U.S.C. 390b) declares it to be "the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes," and states that "the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects" (*ibid.*).

To carry out this policy, the Act provides that in the planning of dams by the Corps of Engineers or the Bureau of Reclamation, impoundment of water may be included to meet present and future needs for municipal and industrial use."[73]

In the Federal Water Project Recreation Act of 1965 (79 Stat. 213, 16 U.S.C. 460*l*–12 *et seq.*), Congress provided for consultation with the States regarding recreation and fish and wildlife enhancement before the submission to Congress of plans for a reclamation project."[74] Moreover, the Act requires, with certain exceptions,"[75] that after 1965 the construction of such facilities be dependent on the acceptance by state and local public agencies of responsibility for administration and partial cost sharing. See Sections 2 and 3(b) of the Act, 16 U.S.C. 460*l*–13, 460*l*–14(b).

In addition, Congress has provided a framework for federal-state planning for the coordinated development of water and land resources in large geographic regions. The Water Resources Planning Act,

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[73] *Ibid.* Up to 30 percent of the cost of a project may be allocated to anticipated future use, if state or local interests give reasonable assurances that there will be a need for the provisions and that they will be paid for within 30 years after they are first used.

[74] Section 6 of the Act, 16 U.S.C. 460*l*–17, requires that the views of the Secretary of the Interior regarding the outdoor recreation aspects of a project plan that is submitted to Congress include a discussion of the degree to which the proposed recreation and fish-and-wildlife development accords with the State's overall plans.

[75] See Sections 3 and 6, 16 U.S.C. 460*l*–14, 460*l*–17.

79 Stat. 244, 42 U.S.C. 1962 *et seq.*, adopted in 1965, declares it the policy of Congress:

> to encourage the conservation, development, and utilization of water and related land resources of the United States on a comprehensive and coordinated basis by the Federal Government, States, localities, and private enterprise * * *.

To this end Title II of the Act (42 U.S.C. 1962b–1962b–6) authorizes the President to establish river basin commissions, including both state and federal officials, which would serve as "the principal agency for the coordination of Federal, State, interstate, local and non-governmental plans for the development of water and related land resources in its area, river basin, or group of river basins" (42 U.S.C. 1962b(b)(1)).

Finally, as we have noted (pp. 100–102, *supra*), the National Environmental Policy Act, which applies to reclamation projects such as New Melones, mandates the involvement of state and local agencies. Section 102(2)(C) of the Act (42 U.S.C. 4332(2)(C)) provides that along with copies of the environmental impact statement prepared by the responsible federal official,

> * * * the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;[76]

2. THE STATE OF CALIFORNIA WAS FULLY INVOLVED IN THE PLANNING AND AUTHORIZATION OF THE NEW MELONES PROJECT

The combined result of the statutes just outlined is to draw the affected States into the formulation and planning of reclamation projects at every stage.[77] The State is given access to information developed during the investigation of a new project. The proposed project reports are sent to the State for comments and recommendations. State officials are consulted regarding specific matters such as wildlife and recreation planning, present and future needs for municipal and industrial water supplies, and water quality control. State and local authorities are given opportunities to have certain features provided in the projects by sharing the costs, and in some cases by accepting administrative responsibilities for recreation or wildlife facilities. Evaluation of the environmental impact requires opportunity for state and local participation. Perhaps most important, the State's views and rec-

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[76] Also as noted earlier (p. 101 n. 71, *supra*), the Endangered Species Act of 1973 (16 U.S.C. (1976 ed.) 1531 *et seq.*) gives the States an advisory role to the Secretary of the Interior.

[77] The current procedures for initiating a reclamation project, which spring from Section 9(a) of the Reclamation Project Act of 1939, 53 Stat. 1193, are described by Professor Sax in 2 Clark, *Waters and Water Rights* § 112.2 (1967). The description is reproduced in the *amicus* brief of the Pyramid Lake Paiute Tribe of Indians, at 14–18.

ommendations on the proposed project are submitted to Congress along with those of the federal agencies."[78]

As a practical matter, of course, the views of a State and of the State's representatives in Congress on a bill to authorize a reclamation project in that State are not without influence. If the State opposed the project, its authorization would not be likely.

The procedures just outlined were followed here, with slight variations. The State of California was fully involved in the planning and authorization of the New Melones Project.

Because New Melones was initially authorized in 1944 as a flood control project to be constructed by the Corps of Engineers (rather than a multi-purpose project, which would ordinarily be constructed by the Bureau of Reclamation), the initial report and analysis underlying the 1962 authorization was prepared by the District Engineer of the Corps, rather than the Regional Director of the Bureau (Project Document, at 13–62). This report was submitted by the Corps to the Secretary of the Interior and the State of California (see App. A, *infra,* pp. 1A–27A). California endorsed the project and recommended its approval (*id.* at 26A), with certain qualifications."[79]

[78] Under the Flood Control Act of 1944, if an affected State expresses objections to a project plan, that project can only be approved by an Act of Congress. See p. 105, *supra.*

[79] The qualifications were that recognition should be given to the rights of upstream users who were dependent on the waters of the Stanislaus River; that water should be released for downstream fisheries, and land acquired for fish and wildlife; that studies should be authorized to develop the full potential of the North Fork of the Stanislaus River; and that the Bachelor Service area should be provided with water (App. A, *infra*, pp. 26A–27A). The Chief of the Corps of Engineers responded (Project Document, at xxxiv–xxxv) that the Bureau and the Corps intended to recognize the needs of upstream users; that the Corps had accepted the recommendations of the Fish and Wildlife Service, which were consistent with California's recommendations, concerning downstream fish releases; that the Corps intended to serve the needs of local areas (such as Bachelor); but that the additional studies suggested would be within the purview of the Bureau of Reclamation.

Both the State's comments and the Corps' response were included in the Project Document submitted to Congress. Congress reauthorized the project "substantially in accordance with the recommendations of the Chief of Engineers" (76 Stat. 1191).

After the 1962 reauthorization, consultation between federal and State officials in planning the New Melones Project continued. One example is the Memorandum of Agreement signed in 1969 by the Bureau and the Central Valley Regional Water Quality Control Board, concerning the water quality releases to be made from the project (A. II, 148–151).

In addition, the Bureau's practice of following state filing requirements to appropriate water for its projects has provided for further coordination between the federal government and the State with respect to the New Melones project. As petitioners note (Br. 43–45), the permit systems developed by California and other western States regarding the appropriation of water rights enable the State to "quantify the federal water right[s]" and thus "to quantify the amount of unappropriated water that remains avail-

able for use by others." The Bureau's filings in this case gave the state Board that information.[80]

Thus, the existing, congressionally mandated procedures provide full opportunity for the affected States and state agencies to make their views on a proposed reclamation project known to Congress and to work with federal officials in planning the project. These procedures would be pointless if, as petitioners contend, the States could impose unilateral conditions on reclamation projects by way of their appropriation permits. Then the state Board would have the final authority over the specifications, functions, and operation of the project, with power to override not only decisions of the Secretary of the Interior but mutual agreements between federal and state authorities. The proposal cannot be squared either with the congressional scheme for federal-state cooperation or with the fundamentally federal nature of the project.

C. CONGRESS HAS RECOGNIZED A NEED FOR UNITARY ADMINISTRATION AND ULTIMATE ADMINISTRATIVE AUTHORITY WITH RESPECT TO RECLAMATION PROJECTS, AND HAS GIVEN THESE FUNCTIONS TO THE SECRETARY OF THE INTERIOR

Planning for a reclamation project requires analysis of the value of the proposed project and the need

[80] In fact, the Bureau's filings gave the Board information in considerable detail, including the point of diversion, point of use, uses for which the water was to be applied, and other information (A. II, 41–47). See the brief of *amici* Friant Water Users Association *et al.* (at 23–26) for a description of the information available to the state Board from such filings under California law.

for it, of its engineering and economic feasibility, of the balance of reimbursable and nonreimbursable project functions, and of the application of congressionally established policies regarding environmental protection, fish and wildlife conservation, outdoor recreation, water quality, and many other things. These judgments, and others that may be expressed in particular project authorizations, guide the construction and operation of individual projects. Pursuant to this delegated authority, the Secretary of the Interior contracts for the sale of project water and project power, having in mind both the financial consequences and the policy considerations involved.

Moreover, reclamation projects are often interrelated. The 1962 reauthorization of New Melones, for example, provides that it "shall become an integral part of the Central Valley Project" (76 Stat. 1191)—a project that presently includes seven main storage reservoirs, with two more under construction.[81]

Accordingly, this Court's comments in *Arizona* v. *California, supra,* 373 U.S. at 589–590, apply with equal force to New Melones and other reclamation projects:

> It was only natural that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make certain

[81] For a description of the current operations of the Central Valley Project, see Department of the Interior, Bureau of Reclamation, *Total Water Management Study for the Central Valley Basin, California: Interim Water Supply* (*Working Document No. 9*, March 1976).

> that the waters were effectively used. All this vast, interlocking machinery—a dozen major works delivering water according to congressionally fixed priorities for home, agricultural, and industrial uses to people spread over thousands of square miles—could function efficiently only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse, often conflicting interests of the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation.

While Congress has provided for extensive coordination between federal and state entities in the planning of reclamation projects, it has also delegated to the Secretary of the Interior, pursuant to the reclamation laws generally and the New Melones authorization in particular (see 76 Stat. 1191; pp. 91–103, *supra*), broad authority to operate and maintain reclamation projects. Such a choice was necessary. As Professor Sax has noted, "[i]f there is to be a joint, comprehensive, and co-ordinated program, legal mastery of it must come to rest somewhere" (2 Clark, *supra*, § 124, at 284).[82]

[82] Project needs may vary over time. The Bureau does have a degree of operational flexibility to meet changing conditions, and it attempts to exercise this flexibility in coordination with the States (see remarks by Gilbert G. Stamm, Commissioner of Reclamation,

Not unnaturally, Congress has lodged that legal mastery in the federal government. Petitioners would lodge it in the state Board—but only, they claim, "where Congress has not spoken" (Br. 59). Their proposal is unworkable. It would invite repeated recourse to the state Board by state and local authorities, water users, citizens' groups, and individuals who did not get what they wanted from Congress or the Secretary of the Interior.[83] It would invite repeated rulings by the state Board on whether or not particular aspects of a project were within the scope of "the specific laws and policies established by Congress, including the purposes of its individual projects" (Br. 59).

And there would follow repeated litigation, such as this case. It would be left to the courts, faced with the 25 conditions of Decision 1422 or their legion of siblings, to decide whether or not, by each of them, "the project's purposes [would be] impaired" (*Ibid.*). The result would be to transfer to the courts the planning and operational authority over the proj-

A. II, 101, 108–110). More substantial changes in conditions may require an alteration in the basic project plans. If an affected State believes such a change is warranted, it can return to the Secretary and to Congress.

[83] Needless to say, it cannot be assumed that particular policy positions, such as those stressing "environmental" values, would coincide generally with either the federal or the state position. For example, other western States may not share the concern that the California Board asserts here for fish and wildlife and white water rafting. In any event, such policy preferences vary not only from state to state but from time to time.

ect—an inherently administrative kind of authority—that Congress gave to the Secretary.

IV

THE LANGUAGE, THE LEGISLATIVE HISTORY, AND THE ADMINISTRATIVE CONSTRUCTION OF SECTION 8 ALL FAIL TO SUPPORT PETITIONERS' VIEW OF THE STATUTE AS ALLOWING THE STATES TO IMPOSE CONDITIONS ON THE OPERATION OF FEDERAL RECLAMATION PROJECTS

Petitioners rely (Br. 17–40) on the language, the legislative history, and the alleged administrative interpretation of Section 8 to argue that it "provides for state control of appropriation and distribution of water developed under the act" (Br. 19). Given this Court's pronouncements in *Ivanhoe,*[84] *City of Fresno,*[85] and *Arizona* v. *California,*[86] *supra,* rejecting "[t]he argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law" (*Arizona* v. *California, supra,* 373 U.S. at 586), petitioners are essentially asking the Court to reconsider and overrule those cases.[87] There is no basis for doing so. The language of Section 8, the legislative history, and the administrative practice all support the interpretation that the Court announced in those cases.

[84] 357 U.S. 275, 291–292.

[85] 372 U.S. 627.

[86] 373 U.S. 546, 586–587.

[87] See Pet. Br. 52–53 n. 40. Dean Meyers as *amicus* makes the request explicit (Br. 5, 11–12, 14).

A. THE RECLAMATION ACT OF 1902 REFLECTED A CONGRESSIONAL DETERMINATION THAT RECLAMATION WAS A PROGRAM OF NATIONAL IMPORTANCE THAT SHOULD BE UNDERTAKEN AND CONTROLLED BY THE FEDERAL GOVERNMENT, NOT THE STATES

We start, chronologically, with the legislative history. It indicates, as the district court concluded (A. I, 67), that the 1902 Congress viewed reclamation as "an undertaking of national concern, transcending the often arbitrary geographic boundaries of individual states and territories" and necessitating "broad federal power in the development and construction of reclamation projects." Section 8 as originally drafted included strong "States' rights" language, but this language was modified and state law given a restricted role in the final Act. Although the debates on Section 8 include statements of the most extreme opposing views,[88] the 1902 Act as a whole, especially when viewed in the light of succeeding reclamation legislation, confirms this Court's view that federal reclamation projects are large-scale undertakings deliberately placed by Congress under the unitary control of federal officials, particularly the Secretary of the Interior. Congress did not intend to subject these comprehensive programs, which incorporate a host of fed-

[88] The commentary on the history of the reclamation laws suggests that in many cases the "subtlety of reclamation law and politics" resulted in "congressional deference to state control [that] was more verbal than real." Sax, *Problems of Federalism in Reclamation Law*, 37 Colo. L. Rev. 49, 70–71 (1964). Cf. *Wirtz* v. *Glass Bottle Blowers Association*, 389 U.S. 463, 468.

eral policies and goals, to state administration and control.

Because of the failure of both private and state efforts at irrigating the arid lands in the West, pressure had been mounting during the final decade of the 19th century for some form of federal support for irrigation. Many bills on the subject were introduced in Congress during the years 1898–1902.[89]

As petitioners acknowledge (Br. 20–21), the legislative history of the 1902 Act reflects a determination by Congress that reclamation of the arid West was of not merely local, but national, importance. Both the House and Senate Committee Reports urging passage of S. 3057—the bill that ultimately became the Reclamation Act of 1902—in the First Session of the Fifty-Seventh Congress (1902) emphasized that only the federal government could successfully undertake large reclamation projects. As the House Report stated, the magnitude of the contemplated projects "clearly place[s] them beyond the reach of private enterprise," and in any event "the importance of this class of works to a large number of users is so great that it is very questionable, as a matter of public pol-

[89] See, *e.g.* 55th Cong., 2d Sess. (1898): S. 4017, H.R. 9994; 55th Cong., 3d Sess. (1899): H.R. 11795; 56th Cong., 1st Sess. (1900): S. 205, H.R. 5022; 56th Cong., 2d Sess. (1901): H.R. 13846, S. 5833, H.R. 13993, H.R. 14072, H.R. 14088, H.R. 14165, H.R. 14192, H.R. 14203, H.R. 14241, H.R. 14250, H.R. 14280, H.R. 14338; 57th Cong., 1st Sess. (1902): H.R. 52, H.R. 63, H.R. 125, S. 595, H.R. 7676, H.R. 9676, and S. 3057 (the last cited bill ultimately became, *as amended*, the 1902 Reclamation Act).

icy, whether they should ever pass out of public control." H.R. Rep. No. 1468, 57th Cong., 1st Sess. 3 (1902); see also S. Rep. No. 254, 57th Cong., 1st Sess. 5 (1902). The House Report added: "It will be readily understood that with no source of revenue for the irrigation of these lands except ordinary taxation and with but a small portion of their lands taxable the States can not, by any possibility, secure funds to carry on reclamation" (H.R. Rep. No. 1468, *supra*, at 4).

The debates highlighted reasons why state control of reclamation was rejected. Representative Mondell pointed out (35 Cong. Rec. 6676) [90] that if the States undertook reclamation,

> * * * the disposition would be to utilize all of the waters flowing through a State within the State, provided there was no prior appropriation lower down on the stream, regardless of the most beneficial and economical development of the irrigation possibilities of the entire region. Further, the constitutions of some of the States forbid the undertaking of works of internal improvement; and even were the States the proper agency through which to carry on this development, none of the States in the arid region are financially able to do so.

Congressman Reeder said (35 Cong. Rec. 6740):

> We have been told that the Government, which is the owner of these lands, should not

[90] Unless otherwise noted, references to the Congressional Record are to the proceedings of the 57th Congress, 1st Session, in 1902.

> reclaim them itself, but should cede them to the States. It is a sufficient answer to that to say that many State grants have been already made of different amounts of land and for different purposes, and the experience of the past has demonstrated beyond any question that the States can not be safely intrusted with the reclamation and settlement of these lands. No matter what conditions might be imposed on such a grant, schemers and speculators would find some way of manipulating the State legislatures and getting control of the lands in large tracts which would retard settlement.

And Congressman Newlands, whom petitioners describe as "[t]he leading congressional authority on reclamation" (Br. App. 1a), stated (35 Cong. Rec. 6673):

> Both [political] parties declared in favor of the reclamation of these arid lands by the National Government and the holding of such lands for actual settlers, and in so declaring they but followed the general sentiment of the country, which was against any abandonment of its trust by the National Government and its surrender to the States.

B. SECTION 8 WAS AMENDED TO ELIMINATE A PROVISION THAT STATE LAW SHOULD CONTROL THE USE AND DISTRIBUTION OF RECLAMATION WATER

An important issue before Congress was the extent of control the States would have over the waters made available by reclamation. Section 8 of S. 3057, as originally drafted and passed by the Senate, contained a strong "States' rights" provision:

> SEC. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, *but State and Territorial laws shall govern and control in the appropriation, use, and distribution of the waters rendered available by the works constructed under the provisions of this act:* Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. [S. 3057, 57th Cong., 1st Sess., § 8 (1902); emphasis added.]

Had this language been enacted, it would have offered substantial support for petitioners, who virtually track the italicized language in asserting that Section 8 "provides for state control of appropriation and distribution of water under the act" (Br. 17).[90a] But the italicized language was not enacted. It was deleted by the House Committee on Irrigation of Arid Lands. H.R. Rep. No. 1468, 57th Cong., 1st Sess.

[90a] Even so, it is difficult to see how even the italicized language would have authorized a State to prevent the impoundment of a reservoir, or otherwise to prevent the "works constructed under the provisions of this act" from rendering waters available in the first place.

(1902). The Committee's amended version was Section 8 as ultimately enacted, reading as follows:

> SEC. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, *or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof:* Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. [Emphasis added.] [91]

[91] Petitioners, in an appendix to their brief (Br. App. 1a), claim that the House Committee's amendment had no effect. They report Congressman Newlands as stating "that the amended bill was 'identical in its provisions, though differing somewhat in phraseology,' with the original bill, and that the amended bill was 'absolutely in harmony with the original bill.'" Br. App. 1a, quoting 35 Cong. Rec. 6673–6674. The record discloses that the "original bill" to which Mr. Newlands was referring was not S. 3057, the bill that the House Committee had amended, but a different bill that Mr. Newlands had introduced "[a]t the last session of Congress, and before Mr. Roosevelt came into power." 35 Cong. Rec. 6673. Newlands stated: "And if the gentleman will examine that bill—introduced in Congress before Mr. Roosevelt became President—he will find that it is identical in its provisions, though differing somewhat in phraseology, with the bill which is now before us for consideration" (*ibid.*). Compare Pet. Br. App. 4a. See also 35 Cong. Rec. 6674, quoted in note 92, *infra*.

The change made by the House Committee resulted at least in part from intervention by President Roosevelt, as explained by Representative Robinson when the bill reached the House floor (35 Cong. Rec. 6670):

> At the beginning of this session the arid-State members in committee assembled properly elected the gentleman from Nevada chairman and proceeded to draft an irrigation bill. The committee was composed of a large majority of Republicans, but politics was submerged to get some irrigation legislation.
>
> The committee, of course, was confronted with platforms and constitutions, national and State. Where they pointed their way, they adopted them; where they ran counter, they ran over them or passed them by.
>
> They took up first the Republican national platform of 1900, and upon that this bill was drafted and introduced in the Senate. After a little while the bill passed without a division in the Senate, and went to the House Committee on Arid Lands, a majority of whose members are from arid or semiarid States.
>
> The troubles then began. The President was for one kind of irrigation, with national control of canals and water distribution, and the Republican platforms, national, State, and Territorial, and some State constitutions of States affected, were for another kind, with State control of canals and water distribution. *The President told the committee that called on him that the Senate bill was not in consonance with his ideas of irrigation; that if the United States*

> *built canals it should, to keep the water supply from politicians, control the distribution.* [Emphasis added.] [92]

President Roosevelt's autobiography supports Robinson's account of the purpose of the amendment:

> On the day the message was read, a committee of Western Senators and Congressmen was organized to prepare a Reclamation Bill in accordance with the recommendations. By far the most effective of the Senators [*sic*] in drafting and pushing the bill, which became known by his name, was Newlands. The draft of the bill was worked over by me and others at several conferences and revised in important particulars; *my active interference was necessary to prevent it from being made unworkable by*

[92] Petitioners contend that this statement "was immediately clarified in part, and repudiated in part, by Congressman Newlands" (Br. App. 4a), a contention they base on the statements by Newlands (35 Cong. Rec. 6673–6674) previously cited by petitioners at Br. App. 1a and discussed in note 91, *supra*. In fact, Newlands was responding to Robinson and discussing the President's intervention with respect to the issue, not of state control, but of "monopoly and concentration of ownership"—"[w]e all wanted to preserve that domain in small tracts for actual settlers and homebuilders." 35 Cong. Rec. 6674. But the passages quoted by petitioners, in which Newlands denied the significance of the President's intervention, again asserted the similarity, not between the bill then pending in the Senate and the same bill prior to the House's amendment of Section 8, but between the pending bill and the "original bill" that Newlands had introduced in the previous Congress. Thus: "And let me say to the gentleman from Indiana [Robinson], lest he charge that our action was the result of Executive dictation, that these changes were absolutely in harmony with the original bill, which I had introduced before Mr. Roosevelt succeeded to the Presidency, and with the platform of both parties." 35 Cong. Rec. 6674; compare Pet. Br. App. 1a.

> *an undue insistence upon State Rights,* in accordance with the efforts of Mr. Mondell and other Congressmen, who consistently fought for local and private interests as against the interests of the people as a whole.

Theodore Roosevelt, *An Autobiography* 396 (Scribners' Sons ed., 1926) (emphasis added).[93]

[93] Petitioners put foward a contrary view of the purpose of the amendment. They suggest that the President's later statements are of dubious "admissibility" (Br. App. 4a–5a), and they quote at length from a "contemporaneous account" (Br. App. 3a) of the President's actions. This account is identified only as "A Washington dispatch of April 2d" found in the newspaper records of Humboldt County, Nevada (A. II, 113). Petitioners also contend (Br. 23) that the following portion of President Roosevelt's statement to Congress, 35 Cong. Rec. 6775, supports their interpretation of Section 8:

"These irrigation works should be built by the National Government. * * * The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with those laws or with vested rights. The policy of the National Government should be to aid irrigation in the several States and Territories in such manner as will enable the people in the local communities to help themselves, and as will stimulate needed reforms in the State laws and regulations governing irrigation."

This statement draws a distinction between the main irrigation works, such as reservoirs and canals, to be built by the federal government, and the distributing system, to be built by individual irrigators. The House Report reflects the same distinction, pointing out that "it is not expected or contemplated that the works constructed by the Government will include anything but reservoirs and the main canals, leaving, even under the systems constructed by the Government, all of those diversion and distribution works which may be constructed by individual or cooperative effort, to be so constructed." H.R. Rep. No. 1468, *supra*, at 9. Senator Hansbrough likewise noted, 35 Cong. Rec. 1385, that individual settlers would build "their own distributing systems."

Petitioners suggest that the purpose of the amendment was to meet objections that an upstream State might, if it had absolute control of water, limit the flow of interstate waters to downstream users (Br. App. 2a). But the legislative history shows only that such objections were made—both before and after the Committee's amendment of Section 8.[94] It does not show that the amendment of Section 8 was intended to meet this objection.

C. THE LANGUAGE OF SECTION 8 DOES NOT SUPPORT THE STATE CONTROL FOR WHICH PETITIONERS CONTEND, SINCE IT REFERS ONLY TO STATE LAWS CONCERNING WATER "USED IN IRRIGATION"

Petitioners contend (Br. 18–19) that the "plain meaning" of Section 8, even as amended, "provides for state control of appropriation and distribution of water developed under the act." They read the statute as compelling the Secretary to proceed in conformity with all state laws relating to the control, appropriation, use, or distribution of water (Br. 18).

Section 8 does not say that. To the extent that it refers to state laws, it refers only to those laws "relating to the control, appropriation, use, or distribution of water *used in irrigation*" (emphasis supplied). The Secretary is directed to "proceed in conformity with" those laws, no others.[95]

[94] H.R. Rep. No. 794 (Minority Report), 57th Cong., 1st Sess. 16 (1902); 35 Cong. Rec. 6696 (Congressman Ray).

[95] Even as to conditions relating to irrigation, state jurisdiction appears to be foreclosed and preempted by Section 8 of the Act of August 13, 1914, 38 Stat. 688, 43 U.S.C. 440, which authorizes the Secretary of the Interior "to make general rules and regulations governing the use of water in the irrigation of the lands within any project * * *."

As our review of the conditions imposed by Decision 1422 (pp. 57–86, *supra*) demonstrates, those conditions have little to do with the use of water in irrigation, except perhaps that they try to prevent it. They are concerned with preventing impoundment of water in the first place (pp. 59–66, *supra*), with preferences for "counties of origin" (pp. 67–70, *supra*), with value choices between different forms of river recreation (pp. 61–65, *supra*), with downstream water quality (pp. 70–75, *supra*), with protection of fish and wildlife (pp. 77–78, *supra*), with structural aspects of the project (pp. 78–80, *supra*), access by state officials and others (p. 82, *supra*), and various other matters unrelated to irrigation.

Thus even on the literal reading of the statute that petitioners urge,[96] there is no basis for including all these non-irrigation-related conditions within the scope of the state laws to which Section 8 refers.

Petitioners seek to overcome this obstacle with a one-sentence footnote (Br. 18 n. 13) suggesting that the limitation of Section 8 was somehow removed when Congress provided, in authorizing subsequent multi-purpose reclamation projects, including New Melones, that they should be operated "pursuant to the Federal reclamation laws." Such enactments, however, do no more than they say; they incorporate Section 8 and the other provisions of the reclama-

[96] See also the *amicus* brief of Dean Meyers, at 11, 14.

tion laws. They do not expand that section or those laws. In the absence of some amendment or modification of Section 8 itself, that statute remains limited to state laws concerning "water used in irrigation."

An analogous question was presented by *First Iowa Hydro-Electric Cooperative* v. *Federal Power* Commission, 328 U.S. 152, discussed at pp. 51–54, *supra*. The statute involved there, Section 27 of the Federal Water Power Act (41 Stat. 1077, 16 U.S.C. 821), provided:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Although this statute is broader than Section 8, going expressly beyond irrigation uses,[97] the Court held that an Iowa law prohibiting interbasin transfers of water was not saved or incorporated by Section 27 because it fell outside the scope of the section's coverage (328 U.S. at 175–176). Noting the statute's use of the words "or other uses," the Court held that they were "confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes" (*id.* at 176).

[97] This statute, passed in 1920, demonstrates that Congress was aware of the distinction between state water laws relating to irrigation and those relating to other types of uses, and that when Congress intended to save or incorporate state laws relating to municipal and other uses, it said so.

The holding of *First Iowa* limiting the coverage of Section 27 of the Federal Water Power Act to specific property rights defined by state law applies *a fortiori* here, since Section 27 refers to "water used in irrigation or for municipal or other uses" whereas Section 8 is limited to "water used in irrigation." In *Arizona* v. *California, supra,* 373 U.S. at 588 n. 93, this Court noted the close connection between Section 27 as construed in *First Iowa* and the almost identical Section 18 of the Boulder Canyon Project Act, 45 Stat. 1065, 43 U.S.C. 617q (see pp. 47–50, *supra*).

D. SECTION 8 REAFFIRMS THAT STATES ARE FREE TO ADOPT THEIR OWN SYSTEMS OF WATER LAW AND REQUIRES THE SECRETARY TO RECOGNIZE WATER RIGHTS VESTED UNDER STATE LAW

As the district court recognized (A. I, 63–66), Section 8, as amended, was designed to serve two purposes. It reaffirms that States are free to apply their own rules of water law, and it requires the federal government, in obtaining water for reclamation projects, to recognize vested state water rights in order to determine the property interests for which compensation must be paid.

The introductory portion of Section 8 provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder * * *.

As the district court observed (A. I, 64), this provision "was not written upon a clean slate, but rather, on the overlay of prior federal law." The provision reaffirms the federal policy, first adopted in the Act of July 26, 1866,[98] and restated in the Act of July 9, 1870,[99] of ratifying water rights acquired on public lands under state law principles.

That policy had not always been assured. As petitioners note (Br. 32), there had been substantial doubt whether the doctrine of prior appropriation recognized in the Western States governed the acquisition of private water rights on the vast federal lands located in those states. With the adoption of federal land laws permitting the entry and patent of these lands, Congress could have adopted a federal statutory system governing the acquisition of water rights on them. Instead, in Section 9 of the first general mining law, the Act of July 26, 1866, Congress declared that rights that had been acquired "by priority of possession" to the use of water on public lands, and that were "recognized and acknowledged by the local customs, laws, and the decisions of courts," were to be "maintained and protected." As this Court recognized in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 155, the 1866 and 1870 acts "approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of

[98] Section 9, 14 Stat. 253, as amended, 30 U.S.C. 51.

[99] Section 17, 16 Stat. 218, as amended, 30 U.S.C. 52.

the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain."

At the urging of Western States, provisions have been adopted in many subsequent federal statutes disclaiming any intent to affect or interfere with state water laws or with vested rights acquired under them.[100] See generally Trelease, *Federal-State Relations in Water Law* 79 (1971). These statutes include several that otherwise have little to do with water rights (see, *e.g.*, the Taylor Grazing Act, Section 3, 48 Stat. 1270, as amended, 43 U.S.C. 315b; the Submerged Lands Act, Section 3(e), 67 Stat. 30, 43 U.S.C. 1311(e)). The Court has noted that these provisions were designed to assure the States freedom to develop their own doctrines of water law and to remove any federal impediment to the doctrine of prior appropriation. *California Oregon Power Co., supra,* 295 U.S. at 164. The district court correctly recognized that Section 8 serves the same function (A. I, 65):

> * * * Section 8 does not bind or purport to bind the states to any policy, but recognizes and gives sanction, as far as the United States and its grantees are concerned, to the state law doctrine of appropriative rights to water. In this regard, also, Section 8 guards prior rights

[100] One commentator refers to "the usual boiler plate in federal water laws seeking to protect the rights of the states and to preserve state laws." Haber, *Arizona* v. *California—A Brief Review*, 4 Nat. Res. J. 17, 24 (1964).

> granted by the individual states to individual water users.[101]

The second role of Section 8 complements the first. The statute requires the federal government to recognize vested state water rights when it is acquiring water for a reclamation project. This portion of Section 8 provides that "the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *" —that is, "the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." Thus, this Court has recognized that Section 8 "leave[s] to state law the definition of the property interests, if any, for which compensation must be made" (*City of Fresno, supra,* 372 U.S. at 630), and that "[a]s we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein" (*Ivanhoe, supra,* 357 U.S. at 291).

This view of the purpose of Section 8 is confirmed by the legislative history. Congressman Martin de-

[101] This was the function described by Congressman Mondell and others in their statements on the House floor quoted by petitioners at Br. 27–29. See, *e.g.*, Mondell's statement (35 Cong. Rec. 6679, quoted at Br. 27): "Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard."

scribed the interrelation of Section 7, which authorized the Secretary to acquire any necessary "rights or property * * * by purchase or by condemnation,"[102] and Section 8 as follows (35 Cong. Rec. 6759):

> This section 7, while an important one, is by no means the most important in the bill. It is drawn identically upon the plan of the general statute of eminent domain of August 1, 1888, which provides the manner in which officers of the United States, when it becomes necessary, may acquire property in the furtherance of any public improvement.
>
> It should be read in connection with section 8, which is in the nature of a limitation upon this section. Section 8 provides that the Secretary of the Interior, when proceeding under this act, must proceed in conformity with the State laws. It therefore makes, taking the two sections together, simply an instruction to the Secretary of the Interior to invoke the aid of State laws upon the subject of eminent domain where necessary.

[102] Section 7, 32 Stat. 389–390 (now codified as 43 U.S.C. 421) provides: "That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

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E. THE LEGISLATIVE HISTORY DOES NOT SHOW THAT SECTION 8, DESPITE ITS AMENDMENT, STILL PROVIDED FOR STATE CONTROL OVER FEDERAL RECLAMATION PROJECTS

Since the amendment deleting the strong "States' rights" language from Section 8 (see pp. 120–126, *supra*) was proposed by the House Committee after the Senate had debated and passed the bill, only the House Committee Report and the House debates focused on the amended version of Section 8 that was eventually adopted.[103] Extreme opposing interpretations of the bill were voiced during the debates in the House. Thus, Representative Robinson protested that the bill "involves the robbery of peoples of self-government in States, * * * [requiring them to] submit to be governed 2,000 and 3,000 miles away" (35 Cong. Rec. 6671), while Representative Ray argued that under the bill "[t]he United States Government surrenders all control" (35 Cong. Rec. 6766).

The House Committee Report, however, focused on the role of state law and indicated what that role was to be. The Report noted that "[t]he American irrigator * * * has been instrumental in the adoption of

[103] S. 3057 was passed by the Senate on March 1, 1902, 35 Cong. Rec. 2285. The amendment to the bill was proposed in the House committee report, H.R. Rep. No. 1468, 57th Cong., 1st Sess. 18 (April 7, 1902). The committee amendment was agreed to by the House on June 13, 1902, 35 Cong. Rec. 6766, and the amended bill passed the same day, 35 Cong. Rec. 6768–6779. On June 14, 1902 the Senate accepted the House amendment without debate. 35 Cong. Rec. 6794. The Senate debate quoted by petitioners (Br. 23–24) thus refers to the original version of Section 8, which included the "States' rights" language subsequently deleted by the House amendment.

State constitutional provisions, the enactment of laws, the adoption of rules and regulations, and the establishment of customs relative to the use of water in irrigation in the arid region" (H.R. Rep. No. 1468, 57th Cong., 1st Sess. 8 (1902). The Report continued and concluded (*id.* at 8–9; emphasis added):

> *The bill recognizes the control of these local laws in matters of recording appropriations of water and in establishing and maintaining the rights of users,* but as the laws of some of the States and Territories involved recognize water rights varying considerably in character, and *it was thought best that the water rights provided under Government works should be of the most ideal character, recognizing clearly the principle of public control over waters used in irrigation,* the rights are made appurtenant to the land irrigated on the basis of beneficial use as the best expression of this principle and as an effectual bar to speculative ownership or control of water.[104]

[104] A similar statement appears earlier in the report. After noting that Section 8 "recognizes State control over waters of nonnavigable streams such as are used in irrigation, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to such laws" (*id.* at 6), the report notes the purpose of this compliance (*id.* at 7):

"Under this section uniformity of record of the rights is secured and the rules of priorities of rights are not disturbed, while the cost of maintaining the administrative machinery of water distribution is placed on users and the States; the Government is free from all expense or responsibility when projects are completed and paid for."

(This reference to projects being "completed and paid for" apparently refers to Section 6 of the Act, 32 Stat. 389, which imple-

(Continued)

A similar view was expressed by Representative Mondell during the debates in the House. In describing "how the Secretary of the Interior, as the agent of the Government under this act, would proceed" (35 Cong. Rec. 6678), Mr. Mondell stated (*ibid.*):

> It having been ascertained that a sufficient supply of water for the irrigation of the lands in question was available and unappropriated and the feasibility of a project having been determined, the Secretary of the Interior would proceed to make the appropriation of the necessary water by giving the notice and complying with the forms of law of the State or Territory in which the works were located.[105]

(Continued)
ments the congressional policy that reclamation projects should ultimately pay for themselves by providing that "when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby," except that "the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.") The quoted statement from the Report continues (H.R. Rep. No. 1468, *supra*, at 9):

"The character of the water rights contemplated being clearly defined, the Secretary of the Interior would not be authorized to begin construction of works for the irrigation of lands in any State or Territory until satisfied that the laws of said State or Territory fully recognized and protected water rights of the character contemplated. This feature of the bill will undoubtedly tend to uniformity and perfection of water laws throughout the region affected."

[105] Petitioners emphasize (Br. 26–27) Representative Mondell's quotation of the Republican platform and of a statement by President Roosevelt which, in their view, indicate that Representative

Thus, the House Committee Report states that the bill recognized "the control of these local laws in matters of recording appropriations of water and in establishing and maintaining the rights of users" (p. 135, *supra*), and Representative Mondell noted that the Secretary would refer to the local law "by giving the notice and complying with the forms of law" of the State in which the works were to be located. The legislative history thus provides some support for the contention that the federal government, when acquiring water for reclamation projects, is required—either by Section 8 or by comity—to comply with the forms of state law, including the filing of an application with a state water board for the two purposes of enabling the State to determine whether unappropriated water is unavailable and to give the State notice of the project. But Section 8 was not intended to allow a State to assert control over the operation of a federal reclamation project and to determine the uses of its water, as the state Board is attempting to do here.

Mondell believed that state laws would have a broader role. We have already discussed the President's statement and explained why it does not support petitioners' construction of Section 8 (see note 93, *supra*). In any event, general references to the party platforms and the President's statement were made in the debates primarily to show general support for the enactment of a federal reclamation measure.

Petitioners also rely (Br. 27) on Representative Mondell's discussion of the Mining Acts of 1866 and 1870 and the Desert Land Act of 1977. As noted earlier (pp. 130–132 and note 101, *supra*), this discussion focuses on the introductory language in Section 8, which followed the tradition established in those Acts of recognizing private water rights acquired under the State law.

F. THE ADMINISTRATIVE PRACTICE UNDER SECTION 8 REFLECTS NO RECOGNITION OF ADMINISTRATIVE CONTROL VESTED IN THE STATES

Finally, petitioners contend that the administrative practice of federal agencies under Section 8 supports their claim that it provides for "state control of water" (Br. 36), and they assert that the decisions of the courts below have "altered several decades of settled administrative practice" (Br. 40). The record refutes the suggestion that the United States is urging a novel position or that the balance of federal state relations has been disturbed. As a leading treatise on water law published more than ten years ago stated:

> * * * [T]he Government's present position is that, while it need not comply with state laws, it will participate in state proceedings as a matter of courtesy, and co-operate to the extent that important federal interests are not compromised thereby. [2 Clark, *Waters and Water Rights* § 117.2, p. 175 (1967); footnote omitted.]

The 1975 speech by the Commissioner of Reclamation (A. II, 101–112), which petitioners describe as "[p]erhaps the clearest statement of the historic federal position" (Br. 39), when read in context, likewise shows no federal recognition that state law governs the administration of federal reclamation projects (as opposed to defining proprietary interests). Commissioner Stamm indicated concern regarding "efforts within the State [of California] which appear to have the objective of dictating policies and regulations which would affect the daily operation of Federal

facilities and which would run counter to the authorized functions and obligations of Federal projects" (A. II, 104–105). He continued (*id.* at 105):

> We recognize that the ultimate right to store, divert, and utilize water in accordance with applications made pursuant to State law is one of the key elements of past, present, and future development in the West. Each state has the duty to determine under its own statutes how its unappropriated water is to be used.
>
> Since 1902, the Bureau has consistently taken the position that it will obtain under State law its rights to store and divert water for its projects recommended for Congressional authorization. In fact, water right filings should be made for necessary water rights prior to the conduct of detailed studies, and in most cases this has been done. But certainly the water supply for a given project must be tied down prior to Congressional authorization. It would be foolish to do otherwise. Much time and money could be lost by interim filings.
>
> However, we do maintain the position that once we have filed for water rights pursuant to State law and, through appropriate subsequent proceedings, which vary among States, have obtained the right to use designated blocs of water for designated purposes, the States cannot unilaterally dictate daily operations of the Federal facilities nor unilaterally dictate future changes in authorized uses. Nor could the Bureau adopt changes which would contravene statutory intent or obligation. This

prerogative is reserved to the Congress of the United States.

This statement is fully consistent with the government's position that although Section 8 conveys no administrative control to the States, the Bureau of Reclamation will attempt to comply with the formal requirements of state law in order to give the State notice of the project's water requirements and to permit the State to calculate whether unappropriated water is available to meet them.[106]

Petitioners' description (Br. 36–38) of administrative practice shortly after the passage of the Reclamation Act is likewise consistent with the view that the Bureau attempted to comply with the formal procedures of state appropriation law when possible. The emphasis on compliance with formal filing requirements—*e.g.*, "an application must be made to the State engineer for permission to make an appropriation" (Br. 37)—points up the absence of support for petitioners' contention that the Bureau recognized state law as controlling the administration or operation of federal reclamation projects.[107]

[106] The same is true of other statements petitioners quote (Br. 38), *e.g.*, that "Bureau filings on water are subject to State approval" (95 Cong. Rec. A961 (1949)), and that "the rights of the United States to store, divert, and use water under the law of California * * * have their inception in certain applications by the California director of finance to appropriate unappropriated water, which have been or are to be assigned by him to the United States, [and] in certain applications made by the United States itself." H.R. Doc. No. 416, 84th Cong., 2d Sess. 812 (1956).

[107] The *Proceedings of the First Conference of Engineers of the Reclamation Service*, held in 1904 (A. II, 116–117), cautions that "[b]efore the filing of the first notice of appropriation of water in any state the matter of the advisability of making such filing should be submitted to the chief engineer, because some of the State laws may be such that it is impossible to comply with them in conducting operations under the reclamation act." In the *Proceedings of the Second Conference of Engineers of the Reclamation Service*, held in 1905 (A. II, 118–119), the point was made that "[i]t is important to follow strictly the provisions of law and the local regulations in filing notices of the appropriation," since—"Nothing will be gained by filing these notices unless their form and the subsequent proceedings comply with the provisions of the law, and, accordingly, these matters must be so ordered as to conform to the law and the regulations in all particulars so far as it is possible under the operations of the reclamation act."

The latter proceedings include a survey of state laws (A. II, 119–123), which notes only filing requirements and the time, if any, when work on the project should be begun vis-a-vis the filing date. These references to the state law provisions regarding the time of construction were relevant to determining when a filing should be made and whether there might be a need to amend or renew a filing.

The record thus supports the district court's conclusion (A. I, 88–89) that "all the administrative statements and actions are consistent with the view that the Bureau does and will respect existing state water laws and further, that the Bureau does and will comply with state filing requirements *on the basis of comity.*"

V

Petitioners' Claims of Estoppel Are Without Merit

Petitioners make three arguments in the nature of estoppel. In general, they claim that even if federal law normally prevents the Board from imposing on a federal reclamation project the conditions imposed by Decision 1422, the United States is estopped from

challenging those conditions in this case. The arguments rely on collateral estoppel (Br. 65–67), on equitable estoppel (Br. 68–70), and on the contention that the United States is bound to comply with permit conditions where the applications for the permits were assigned to the Bureau of Reclamation by the State Department of Finance (Br. 70–73). None of the arguments has merit.

A. COLLATERAL ESTOPPEL DOES NOT BAR THE UNITED STATES FROM CHALLENGING THE CONDITIONS IMPOSED BY THE BOARD ON THE NEW MELONES PROJECT

Petitioners assert that "[t]his Court must conclude, as a matter of law, that the conditions of Decision 1422 are not inconsistent with the purposes of the New Melones Project" (Br. 65), because the United States did not seek review of Decision 1422 in the California courts and "[a]ccordingly, the doctrine of collateral estoppel bars the United States from now challenging the validity of the findings" (Br. 66). This argument was rejected by the district court (A. I, 90–92), and, for several reasons, this Court should reject it as well.

First, assuming *arguendo* that the doctrine of collateral estoppel applies to the United States in this case with respect to the conditions imposed by the Board, petitioners' argument must fail because the substantive requirements of the doctrine are not met. The party asserting collateral estoppel must show that the issue in the current action is identical with

the issue that was litigated and determined in the earlier action. See *United States* v. *International Building Co.*, 345 U.S. 502, 504–505; 2 Davis, *Administrative Law Treatise* § 18.04, p. 569 (1958). Here, the issue on which petitioners assert the United States to be collaterally estopped by the decision of the State Board is "that the conditions of Decision 1422 are not inconsistent with the purposes of the New Melones Project" (Br. 65; see also *id.* at 66–67). In fact this issue was not decided by the Board. Nowhere in Decision 1422 did the Board address or decide the question whether the conditions it imposed were consistent with the purposes of the project.[108]

[108] In an effort to bridge the gap between the Board's decision and the issue presented here, petitioners claim that the Board decided "that the Bureau had not shown a 'beneficial use'" (Br. 66), and that since Section 8 of the 1902 Reclamation Act "expressly provide[s] that a water right exists only to the extent that the water is put to a 'beneficial use'" (*ibid.*), the issue decided by the Board was whether the Board's conditions were consistent with the congressional purposes. "In short, Congress, in authorizing the New Melones Project, did not intend for water to be impounded until a 'beneficial use' was shown, and the State Board's findings, that the Bureau has not shown a 'beneficial use', are final." Br. 66.

This reasoning has at least two flaws. Nowhere in its decision did the Board decide "that the Bureau had not shown a 'beneficial use.'" The standard applied by the Board was whether the intended use would be "reasonable, beneficial and *in the public interest*" (A.II, 21; Board's emphasis). It was because "the public interest requires" (A. II, 24, 31), and because of "the maximum public benefit and maximum utilization of the available resources in the public interest" (*id.* at 32), that the Board imposed its conditions against impoundment of the reservoir. Second, even if the Board had decided the "beneficial use" question, that issue of state law would not be identical, for collateral estoppel purposes, with

(Continued)

But even if the state Board had made the finding that petitioners claim it made, the doctrine of collateral estoppel would not bar the United States from obtaining a federal court determination of the issue here. The United States contends that by virtue of federal law the Board had no authority or jurisdiction to impose any conditions on the permits it granted for this federal project, and certainly that it had no authority or jurisdiction to impose conditions inconsistent with the federal purposes of the project. If either contention is correct, it follows, as the district court held (A. I, 91–92), that the Board was not a "court of competent jurisdiction" for the purpose of imposing the conditions that the United States attacks here, and hence that the United States was not required to "pursue California appellate remedies, but rather, could appropriately turn to a federal court in a declaratory relief action for the purpose of interpreting and clarifying federal law" (*id.* at 92). Decisions of this Court, even in the context of federal administrative agencies, agree that an agency decision rendered without authority has no collateral estoppel effect. *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535; *Borax*

(Continued)
the issue of federal law presented by the same language in the Reclamation Act (see 2 Davis, *supra*, § 18.04, at 577–578), especially in the absence of any indication that the state Board considered itself to be interpreting the federal statute or deciding a question of federal law.

Consolidated, Ltd. v. *Los Angeles*, 296 U.S. 10. See 2 Davis, *supra*, § 18.07, at 596–597.[109]

The United States made it clear to the state Board in this case, and the Board recognized, that the United States was not conceding any authority on the part of the Board to impose conditions on a federal project and was reserving its right to challenge any conditions the Board imposed.[110]

[109] The cases cited by petitioners (Br. 66–67) as applying collateral estoppel to decisions of administrative agencies do not involve, and often expressly distinguish, questions of the agency's jurisdiction; in addition, they involve agency determinations of *disputed issues of fact*, in contrast to the question of law presented here as to the consistency of the Board's conditions with the purposes of the project (petitioners' references to the Board's "factual findings" (Br. 66) notwithstanding). Thus, in *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (cited by petitioners at Br. 66), the Court said it was dealing with "an administrative agency [which] is acting in a judicial capacity and *resolves disputed issues of fact properly before it* * * *," and referred twice more to "factual disputes" (384 U.S. at 422; emphasis added). In *United States* v. *Fallbrook Public Utility District*, 165 F. Supp. 806 (S.D. Cal.) (cited by petitioners at Br. 66), a determination by the California State Water Board on the factual issue of priority of use was held not subject to collateral attack by the United States, but the court stated: "[I]f the board has acted within its jurisdiction, its decisions are not subject to *collateral attack* * * * " (165 F. Supp. at 857; emphasis in original). (Also, the United States stipulated in that case that state law would control and that the sovereignty of the United States was not involved. *Id.* at 816.)

[110] The opening brief of the United States before the Board stated (A. II, 86): "Under the law as declared by the courts the Board's function becomes ministerial. It must determine whether unappropriated water exists. A permit for the unappropriated water then follows as a matter of course."

At the Board's hearing, counsel for the Contra Costa Water Agency moved for a 30-day suspension during which "the U.S.

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The claim that the United States is nonetheless collaterally estopped by the Board's decision imposing such conditions, and deprived of its right to challenge the Board's authority in federal court, is a circular

(Continued)
Bureau of Reclamation will be required to enter into an appropriate stipulation with this board * * * to the effect that it will be bound by any terms and conditions incorporated in any permit issued herein; and * * * that if it does not enter into such a stipulation * * * that this proceeding be dismissed." Tr. 15–16. The moving counsel explained: "It's unnecessary, of course, to elaborate on the proposition that the United States of America has taken the position unequivocally to the effect that they are not bound by any terms and conditions in any permits issued by this board." *Id.* at 16. Counsel for the Board (Mr. Craig) opposed the motion on the ground "that the board does not have the power to require the Bureau or the United States to enter into any such stipulation, and we have every reason to believe that if the board made the order that is requested, that the result would be that these proceedings would be terminated." *Id.* at 17. He added: "Now, the question that we are interested in—the authority of the board is going to be determined in the court. It can't be determined here, we know * * *. * * * It seems to me that * * * it would be much better to proceed, have the board make its decision, and if it is challenged, then it would be, of course, litigated in the courts * * *." *Id.* at 17–18. The Board's presiding officer denied the motion. *Id.* at 18. The motion was later renewed in a brief to the Board, which held in Decision 1422 that it had been "properly denied" (A. II, 12).

Petitioners state (Br. 15, 66) that "the United States conceded below, in oral argument, that it cannot contest the validity of the [Board's] findings," citing a statement to that effect by Judge Wallace (A. I, 36 n. 1). We are informed by the clerk of the court of appeals that its recording of the oral argument has been routinely erased. The attorney who argued the case for the government in the court of appeals does not believe that he made any such concession, which would have been inconsistent with the government's brief in the court of appeals (authored by the same attorney). The brief attacked "the argument by the State that Decision 1422 is binding" as "an exercise in circular reasoning," and stated: "Even if the United States could have voluntarily

argument that effectively concedes to the Board some of the authority at issue. If federal law precludes any Board decision imposing conditions on federal permits, the United States, merely by seeking a permit from the Board, should not be held to have submitted to any decision-making power of the Board with respect to such conditions. Cf. *Dugan* v. *Rank*, 372 U.S. 609; *Minnesota* v. *United States*, 305 U.S. 382, 388–389. Such a result would be inconsistent with the principle that even a private party who is entitled to have a case determined by a federal district court may not be compelled, without fault or consent, to accept a state court's determination instead. See *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411.[111]

B. THE EQUITABLE DOCTRINES OF ESTOPPEL, ELECTION, AND WAIVER DO NOT BAR THE UNITED STATES FROM CHALLENGING THE CONDITIONS IMPOSED BY THE BOARD

Petitioners next contend (Br. 68–70) that "the equitable doctrines of estoppel, and election and waiver" require the United States to comply with State-imposed conditions when it acquires water per-

been a party in this case, the federal representatives objected to any procedure other than ministerial issuance of a permit, and cannot be bound by other proceedings without any federal consent." Brief for the United States in the Court of Appeals, June 1976, at 13.

[111] Consistently with the *England* decision (see *id.* at 420–422), the United States made it clear here (see note 110, *supra*) that in seeking permits from the Board it was not consenting to any authority of the Board to determine any federal question with respect to the imposition of conditions on the permits.

mits under state law. The contention was appropriately rejected by the district court (A. I, 89–90).

Assuming *arguendo* that equitable estoppel could be applied to the United States in a context such as this (but see, *e.g., United States* v. *California,* 332 U.S. 19, 40), there is no basis for its application on these facts. As the district court pointed out, the disagreement between the United States and California concerning the Board's authority to impose conditions on federal permits—a disagreement well known to the Board in this proceeding, see note 110, *supra*—precludes application of the estoppel notion "that the United States 'knew' the true facts and thereby 'induced' California to engage in detrimental conduct" (A. I, 90). If the United States receives benefits by obtaining permits under the State's appropriation laws, as petitioners contend (Br. 69–70), but is not legally required to submit to conditions imposed on those permits, and all parties are aware of their respective legal rights and claims, equity does not require that the law be different.[112] This argument, too, is circular. It begs the legal question whether federal reclamation projects may indeed be subjected to State-

[112] Petitioners' argument appears identical to the motion that would have terminated the Board's proceeding unless the United States agreed to be bound by any conditions imposed by the Board on permits it issued. See note 110, *supra.* As the proponent of the motion argued (Tr. 18): "[I]t seems utterly unfair to us * * * for the government to come in and seek water rights * * * and those permits in one breath and then to say in the next that the government is not bound by any terms and conditions * * *." The Board, a petitioner here, held that the motion had been "properly denied." A. II, 12.

imposed conditions because the United States seeks appropriation permits from the State Board.

C. THE UNITED STATES IS NOT REQUIRED TO COMPLY WITH PERMIT CONDITIONS BECAUSE THE APPLICATIONS FOR THE PERMITS WERE ASSIGNED TO THE UNITED STATES BY A STATE AGENCY

Finally, petitioners contend (Br. 70–73) that the United States must in any event comply with conditions imposed on permits issued to the United States by the state Board where the applications for the permits were filed originally by a state agency and then assigned to the United States.[113] This argument was duly rejected by the court of appeals on petition for rehearing (A. I, 38–41). As the court pointed out, relying on "California law" (*id.* at 38), the assignment to the Bureau "was of an application, not of a permit containing conditions," and the application carries no rights vis-a-vis the State (*id.* at 38–40). Hence after the Bureau became the assignee, "it was acting in the same capacity as when it filed its own applications" (*id.* at 40). It is true, as petitioners emphasize (Br. 71), that the application assigned to the Bureau carried an earlier priority date, but there is no reason why the earlier priority obtained through assignment of the application should subject the Bureau to permit conditions to which it would otherwise be immune. As the court of appeals stated (A. I, 40), "[t]here is no contention that the assignment was ex-

[113] The State Department of Finance filed the applications, of course, in anticipation of the New Melones Project and in order to protect a priority date for appropriation of the necessary water. See A. II, 47–48, 55–56.

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pressly conditioned upon acceptance of whatever permit conditions the State might impose." [114]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1978.

[114] This fact distinguishes petitioners' hypothetical case (Br. 72) of a federal agency purchasing from a State an option to buy a building "on condition that the federal agency comply with the state's zoning laws."

Petitioners reply (Br. 73 n. 51) that "the assignments did not become effective until their approval by the State Board, at which time the State clearly expected the Bureau to comply with the conditions therein," for which they cite Defendents' Exhibit 4. A. II, 69–71. This is a 1967 letter from the Bureau to the Board simply requesting assignment of the applications. It provides no apparent support for petitioners' statement about what the State expected at the time the assignments were approved by the Board in 1973, or at any other time. The position taken by the United States before the Board (see note 110, *supra*) would seem to have warranted a different expectation.

APPENDIX A

COMMENTS OF THE STATE OF CALIFORNIA

THE RESOURCES AGENCY OF CALIFORNIA, DEPARTMENT OF WATER RESOURCES

April 20, 1962.

Lieut. GEN. WALTER K. WILSON, JR.,
Chief of Engineers, Department of the Army,
Washington, D.C.

Subject: Your File No. ENGCW-PD

DEAR GENERAL WILSON: Your proposed report entitled "Review Report for Flood Control on New Melones Project, Stanislaus River, California" was transmitted on January 4, 1962, to the Department of Water Resources, State of California, for review and comments in accordance with the provisions of Public Law 534, 78th Congress, and Public Law 85–624. The views and recommendations of the Department of Water Resources on your report, together with the comments of the Department of Fish and Game, the Division of Highways, the State Reclamation Board, and the Department of Conservation are set forth in the attached report entitled "Review by State of California of Proposed Report of Chief of Engineers, United States Department of the Army, on New Melones Project, Stanislaus River."

The New Melones Project, as proposed in your report, would include a 600-foot earth and rockfill dam on the Stanislaus River, creating a reservoir with a

storage capacity of 2,400,000 acre-feet, and a hydroelectric powerplant with an installed capacity of 150,000 kilowatts, located immediately below the dam. The project would be operated for full development and optimum utilization of the water resources of the lower Stanislaus River as well as to provide an adequate degree of flood protection to lands located along the Stanislaus and lower San Joaquin Rivers. Estimated cost of the project facilities is about $114,000,000.

It is concluded in the State's report that the New Melones Project is economically justified and would provide optimum multipurpose development of the waters of the lower Stanislaus River. Furthermore, it is recommended that the Congress authorize the New Melones Project for construction and operation by federal agencies subject to certain provisions specified in the State's report.

I concur in the conclusions and recommendations contained in the State's report and request that this report be considered as expressing the official views and recommendations of the State of California with respect to the proposed New Melones Project.

Sincerely yours,

/s/ WILLIAM E. WARNE,
Director.

Attachment.

REVIEW BY STATE OF CALIFORNIA OF PROPOSED REPORT OF THE CHIEF OF ENGINEERS, UNITED STATES DEPARTMENT OF THE ARMY, ON NEW MELONES PROJECT, STANISLAUS RIVER

INTRODUCTION

By letter dated January 4, 1962, the office of the Chief of Engineers, U.S. Department of the Army,

transmitted to the Department of Water Resources, State of California, its proposed report entitled "Review Report for Flood Control on New Melones Project, Stanislaus River, California" for review and comment in accordance with the provisions of Public Law 534, 78th Congress and Public Law 85–624. Included with the report of the Chief of Engineers were reports of the Board of Engineers for Rivers and Harbors and of the District and Division Engineers. For the sake of brevity, the "Review Report for Flood Control on New Melones Project" will be referred to hereinafter as the "New Melones Report."

The New Melones Project was authorized by the Flood Control Act of 1944 at a storage capacity of 450,000 acre-feet, with provisions for possible future enlargement to 1,100,000 acre-feet. Further studies of this project by the U.S. Bureau of Reclamation including those for the contemplated East Side Division of the Central Valley Project resulted in a joint investigation by the Corps and the Bureau of the economic justification of a project with reservoir storage capacity greater than 1,100,000 acre-feet. As a result of this joint investigation, larger storage capacity was found to be desirable. The Appropriations Committees of the Senate and House of Representatives authorized an investigation of Melones Reservoir with storage capacity greater than 1,100,000 acre-feet in October 1959. The review report on New Melones Project is a result of that joint investigation.

According to the information presented in the New Melones Report, on the basis of comparison of incremental benefits with incremental costs, New Melones Reservoir with a storage capacity of 2,400,000 acre-feet would be economically justified. This amount of storage capacity would also provide for full develop-

ment of the lower Stanislaus River. A new powerplant, with an installed capacity of 150,000 kilowatts, would be included as part of the project and would provide a large portion of the project benefits.

It is stated in the New Melones Report that New Melones Reservoir with a storage capacity of 2,400,000 acre-feet, when integrated with the contemplated East Side Division of the Central Valley Project, would provide additional average annual new water supplies of about 261,000 acre-feet measured at the service area. This service area, for the purposes of economic analysis, was assumed to be in the water deficient San Joaquin Valley.

The estimated average annual primary benefits of the New Melones Project as presented in the New Melones Report are as follows:

Flood Control	$1,030,000
Irrigation	4,443,000
Power	3,993,000
Recreation (including fish and wildlife)	350,000
Total	$9,816,000

The estimated first cost of the New Melones Project is $114,000,000 with a corresponding annual cost of $6,223,000. The ratio of benefits to costs is 1.6 to 1.

COMMENTS OF DEPARTMENT OF WATER RESOURCES

The Department of Water Resources has a direct interest in all projects involving the development of water resources within the State. Of particular interest is the extent to which these projects are compatible with the comprehensive plan for the general and coordinated development of the water resources of California.

The California Water Plan

Optimum multipurpose development of the New Melones Reservoir site on the Stanislaus River should be made for the purposes of flood control, water conservation, hydroelectic power production, recreation, and fish and wildlife. There is a particularly urgent need for flood control protection to lands located along the Stanislaus and lower San Joaquin Rivers.

At a public hearing on the New Melones Project conducted by the U.S. Corps of Engineers and Bureau of Reclamation in Modesto on October 17, 1960, local interests from Tuolumne, Calaveras, Stanislaus, and San Joaquin Counties generally joined in urging a delay of at least a year in further formulation of the project to allow time for completion of studies of possibilities for development of the waters of the Stanislaus River by local interests. Subsequently, the Stanislaus River Basin Group, composed of Calaveras County Water District, Tuolumne County Water District No. 2, Oakdale Irrigation District, and South San Joaquin Irrigation District, completed a report entitled "Report and Development Plan, Stanislaus River Basin Area" dated October 1961. The department has received this report and is aware of the differences in the plans to develop water at the Melones site as proposed by the Stanislaus River Basin Group with the plans as proposed by the Corps of Engineers. The principal difference is that the Stanislaus River Basin Group proposed to construct New Melones Reservoir with storage capacity of 1,100,000 acre-feet, and the Corps has proposed storage capacity of 2,400,000 acre-feet.

While it is generally desirable to have local development of water to satisfy local needs, it is also desir-

able to obtain optimum development of the water resources of the State. It is noted that the department has not made independent sizing studies of New Melones Reservoir integrated with the Central Valley Project. However, such studies made by the Corps and by the Bureau have been reviewed, and it appears that a multi-purpose reservoir with a storage capacity of 2,400,000 acre-feet at the New Melones site would optimize development of the waters of the Stanislaus River.

The comments of the Department of Water Resources of December 9, 1960, on the draft report of the Corps has been appended to the New Melones Report. However, the portion of these comments pertaining to water rights of counties of origin have not been discussed in sufficient detail in the text of the New Melones Report to indicate concurrence by the Corps. The State has filed several applications for water rights on the Stanislaus River. The first of these were Applications Nos. 5648 and 5649, filed in 1927 specifying a service area within or adjacent to the Stanislaus River drainage basin. Under existing state water law, counties of origin cannot be deprived of any water required to supply their needs by projects operating under these applications. The proposed project would be considered substantially in conformance with The California Water Plan if it were agreed that water would be made available to the counties of origin whenever needed, as specified in water rights Applications Nos. 5648 and 5649.

Service Area

The department agrees that there is a present need in the San Joaquin Valley for all of the water that could be made available from the New Melones Project. For the purposes of the operation studies presented in the New Melones Report, future upstream depletion of the waters available to New Melones Reservoir was estimated to increase to about 60,000 acre-feet annually in the next 50 years. When the State reviewed the draft report of the New Melones Project in December 1960, the future upstream depletion of the waters of the Stanislaus River were estimated to be from about 100,000 to 120,000 acre-feet annually greater than current depletions on the basis of including service to the Hogan Service Area. This service area is located between the Calaveras and Mokelumne Rivers, east of the service area of the Folsom South Canal, and below New Hogan Dam. It has been determined from further study, that this service area could best be served by means of an exchange of water from New Hogan Reservoir and from the proposed Folsom South Canal. Therefore, it is believed that the amount of the future upstream depletion stated in the New Melones Report is reasonable.

As stated in the New Melones Report, water-deficient areas in the San Joaquin Valley to the south of the Stanislaus River could fully utilize the new yield from the New Melones Project. However, there also is need to supply water to the Bachelor Service Area located above the service area of the Folsom South Canal between the Stanislaus and Calaveras Rivers, and below the New Melones Damsite. This area conveniently and logically could be served with water from the New Melones Project and was proposed to be provided water from the Stanislaus River under Applications Nos. 5648 and 5649. It is estimated that the annual water requirement of the Bachelor Service Area during the next 50 years will increase to about 160,000 acre-feet. It is realized that, as an al-

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ternative, this area could be served water from the proposed Folsom South Canal. But, because of the pump lifts involved, it is believed that the Bachelor Service Area should be served water from the Stanislaus River.

Irrigation Benefits

Irrigation benefits that would be realized from the proposed project were evaluated without determining the irrigation yield from the New Melones Project when integrated with the Central Valley Project. However, studies made by the Bureau and the Corps of an integrated operation were reviewed. For the purposes of the New Melones Report, operation criteria included (1) estimates of future upstream depletion of water supply of about 60,000 acre-feet, (2) minimum streamflow in the Stanislaus River below Goodwin Diversion Dam for fishery maintenance of 100 to 200 cubic feet per second, and (3) present demands for irrigation water in the South San Joaquin and Oakdale Irrigation Districts.

To evaluate project irrigation benefits, the Bureau selected the Kaweah Delta in the San Joaquin Valley as the project service area for irrigation water because this area was considered to be reasonably typical of the area of the contemplated East Side Division by virtue of its central location and representative cropping pattern. Farm budgets used in the economic analyses included those for field crops, feeder beef, dairy, grapes, and peaches.

As described in the New Melones Report, the New Melones Project, by virtue of its integration with the Central Valley Project, could provide a new average annual yield of 261,000 acre-feet of water to presently unirrigated lands in the Kaweah Delta portion of the

San Joaquin Valley. The annual irrigation benefits would be about $8,202,000 measured at the place of water use. These benefits, including those accruing from ground water recharge and savings in pumping costs, were projected back to the reservoir by deduction of costs of the conveyance and distribution systems. The annual primary irrigation benefits creditable to New Melones Project, therefore, would be $4,443,000 measured at the reservoir. While no specific estimates of benefits accruing to ground water recharge or savings in pumping costs were made in reviewing the New Melones Project, it is believed that the irrigation benefits as shown in the report are reasonable. As stated in the New Melones Report, additional studies would be required to determine which of the possible alternative service areas should be served new irrigation water from the project. It is again noted, however, that the Bachelor Service Area would be a logical area to receive project water from the Stanislaus River.

Power Benefits

The New Melones Report states that due to the increasing demand for power in Northern California, power output from the New Melones Project could be readily absorbed into the power market area. In general, it is agreed that this conclusion is correct. However, it may not be practical by the year 1969 for the Northern California system to absorb power at the capacity factor assumed in the New Melones Report. The physical limitations and contract requirements pertaining to certain powerplants, limit the flexibility with respect to capacity factors, for proposed hydroelectric powerplants in Northern California.

If proposed hydroelectric generating capacity as presently contemplated by the various private, local, state, and federal agencies is constructed, there are indications that some of this new hydroelectric capacity may not be fully useful in meeting the area load during early spring months. The Bureau of Reclamation has stated that a rather flexible mode of water releases and project operation would be permissible for the New Melones Project, when operated in connection with the irrigation purpose of the contemplated East Side Division. In that case, a minimum power generation schedule for New Melones should probably be adopted which would permit optimum integration of the existing and proposed generating facilities.

The New Melones Report states that the optimum size of the project powerplant would be selected after more detailed studies conducted in cooperation with the Federal Power Commission and other interested agencies. These additional studies are desirable, and the project powerplant capacity should be selected after review and agreement of all interested agencies concerning the dry-period operation study and the minimum generation schedule.

The Corps assumed that the operation of the New Melones Powerplant would be integrated with the operation of other powerplants of the Central Valley Project. Power operation criteria was based on an extension of agreements between the Pacific Gas and Electric Company and the U.S. Bureau of Reclamation, similar to the present contracts. Under these assumptions, a dependable capacity of 119,000 kilowatts as stated in the report, is reasonable. However, a review of the present contracts does not appear to

justify the criteria used in preparing the dry-period power operation study. There is no evidence available that the Pacific Gas and Electric Company has accepted this criteria for all future additions to the Central Valley Project. The criteria used for the power operation study of the New Melones Report, therefore, may not be realistic.

Flood Control Benefits

From a review of the flood control data and benefits presented in the New Melones Report and discussions with the Sacramento Division, Corps of Engineers, the estimated average annual flood control benefits of $1,030,000 appear to be reasonable. This value is based on providing protection to an area of 270,000 acres, with a mean annual benefit value of $3.81 per acre.

Recreational Benefits

Estimates of recreational benefits presented in the New Melones Report are based on an estimated number of visitor-days of use and an estimated value of a visitor-day of use.

It is believed that New Melones Reservoir would afford substantial recreation potential regardless of the anticipated fluctuations of the water level of the reservoir. The New Melones Report shows projected total annual recreational use in the New Melones area, including fishing use, of 400,000 visitor-days initially, increasing to 800,000 visitor-days ultimately. Preliminary studies conducted for the review of the New Melones Report indicate that initial and ultimate recreation use in the order of 1,200,000 visitor-days and 2,400,000 visitor-days respectively, are more realistic estimates.

The New Melones Report notes that the National Park Service has estimated recreational benefits at $1.60 per visitor-day, and that the U.S. Fish and Wildlife Service has suggested the use of $5.80 per angler-day. However, as presented in the New Melones Report, in the interest of conservation, recreational benefits have been estimated at $0.50 per visitor-day. Studies by the Department of Water Resources in somewhat similar areas have indicated that a value of from $1.00 to $2.00 per visitor-day is warranted.

The New Melones Report shows a need for an acquisition of approximately 1,500 acres of land for initial public recreational development and for access and protection zones. The cost of such land acquisition would be borne by the federal government. The National Park Service, in their study for the purposes of the New Melones Report, stated that about 1,500 acres of land for initial recreational development and an additional area of approximately 2,675 acres to accommodate the recreation needs for the balance of the repayment period would be required. They further stated that the latter land acquisition should be the responsibility of the agency administering the project recreational area. However, President Kennedy, in his 1961 message on natural resources, stated that steps should be taken to "* * * insure that land acquired for the construction of federally financed reservoirs is sufficient to permit future development for recreational purposes." This policy has been adopted by the Departments of the Army and the Interior. It is believed, therefore, that the additional 2,675 acres of land necessary for future recreational development should be acquired concurrently with acquisition of all other project lands.

Insufficient detail was presented in the New Melones Report to evaluate the adequacy of public use facilities for recreational development. It was stated that it would be desirable for local interests to operate and maintain the recreational developments. This decision should receive serious consideration and coordination with the proper agencies as project plans are developed.

General Design and Project Costs

The design and estimates of cost of the New Melones Project presented in the New Melones Report were reviewed and a cursory field inspection was made of the project site. Additional design and hydrologic information was obtained from the Corps, the Bureau, and the U.S. Weather Bureau.

It is concluded that the foundation of New Melones Damsite is suitable for a rockfill enbankment with a height of over 600 feet and that the embankment slopes shown in the New Melones Report are adequate. Moreover, the proposed diversion and outlet structures also are believed to be adequate. However, geologic studies indicate that the foundation rock in the area of the proposed spillway cut is not competent for an unlined spillway or for cut slopes of ¼ to 1. There are several zones of weak rock which intersect the chute alignment. Even under the moderate flows resulting from use of the spillway for flood control releases, these zones would be expected to erode severely. During times of larger releases, these areas of weak rock would be susceptible to washouts. In view of the foregoing, it is believed that consideration should be given to modifying the spillway design.

The estimates of total project cost presented in the New Melones Report appear to be reasonable.

Upper Basin Features of the New Melones Project

There are several possible water conservation facilities in the upper basin which would optimize the development of the Stanislaus River and would develop water for local upstream use in Tuolumne and Calaveras Counties. These projects would be desirable additions to the New Melones Project. The Bureau of Reclamation currently is studying possibilities for providing water to the Sonora and Keystone Service Areas in Tuolumne County. Past studies of these service areas have indicated that an enlargement of the existing Phoenix Reservoir on Sullivan Creek, and increased diversions of water from the South Fork Stanislaus River to this reservoir, offers the best solution to satisfying present and immediate future water needs of the Sonora and Keystone Service Areas. A firm annual yield of water in the amount of about 30,000 acre-feet could be realized by enlarging Phoenix Reservoir from its existing storage capacity of 850 acre-feet to a storage capacity of 25,000 acre-feet.

Recent studies by the department indicate that there are several possibilities for supplying the water needs of Calaveras County. Local water supplies could be developed for the West Point area by providing small storage reservoirs on Forest Creek, Hunter Creek, and the Middle Fork of the Mokelumne River. New storage on the South Fork Mokelumne River, North Fork Calaveras River, and Jesus Maria Creek operated in conjunction with water diverted from North Fork Stanislaus River would satisfy the needs of the San Andreas and Mokelumne Hill areas.

These local sources of water from tributaries of the Mokelumne and Calaveras Rivers, would not be adequate to supply present and immediate future water needs of upper Calaveras County. The only logical supplemental source of water which could be utilized to supply this area is the North Fork of the Stanislaus River. Provisions could be made to convey a firm annual yield in the amount of about 30,000 acre-feet from the North Fork of the Stanislaus River into the Calaveras River basin for consumptive use purposes. This amount of water plus additional supplies for hydroelectric power production could be diverted through a proposed system of storage and conveyance works consisting of Spicer Meadows Reservoir on Highlands Creek and a conveyance conduit extending down the ridgetop located between Stanislaus and Calaveras River Basins. Hydroelectric power would be developed enroute at three sites near White Pines, Avery, and Stanislaus.

COMMENTS OF RECLAMATION BOARD

Mr. Robert W. James, General Manager and Chief Council of the Reclamation Board, by letter dated March 13, 1962, submitted the following comments.

> The flood control aspects of this project are urgently needed to increase the degree of flood control protection for the portion of the San Joaquin River Project levees along the Stanislaus River and the downstream reaches of the San Joaquin River. We feel that completion of this unit of the over-all San Joaquin River Flood Control System will add an important link to the project. We therefore urge that construction be initiated as soon as possible in order to add substantially to the flood control protection for the downstream levee system.

The comments of the Board of Engineers for Rivers and Harbors provide that local interests shall agree to maintain the existing levees of the Stanislaus River Channel from Goodwin Dam to the San Joaquin River so as to preserve a safe carrying capacity for that reach of at least 8,000 cubic feet per second. It is also noted that the flood control operation of the project is to be accomplished in accordance with the rules and regulations prescribed by the Secretary of the Army.

It is our understanding that no actual surveys were made of the existing levees and channels downstream from Goodwin Dam. The estimation that the existing levees and channel would be adequate for a flow of 8,000 cubic feet per second was based on observation only. In view of the open-ended obligation that this requirement could place on local interests, it is recommended that when the project design is started actual surveys be taken of the channel and levees involved and hydraulic computations be made to determine whether or not the levees are adequate both as to cross section and freeboard. If they are not, it is recommended that additional work be included in the Corps' construction contract to clear the channel and to bring the levees up to grade and section, to adequately contain a flow of 8,000 cubic feet per second.

It is also requested that the levees be widened if necessary and that a patrol road be constructed thereon by the Corps of Engineers so that adequate maintenance can be performed. This would involve the acquisition of necessary rights of way for this purpose. If this procedure is not followed, it would not be possible for any public district to give assurances that the levees

will be maintained in accordance with the requirements of the Secretary of the Army since adequate maintenance could not be performed without a patrol road. It also would not be possible to guarantee that any public district would have access to these levees without acquisition of whatever rights of way will be required for the purpose. At the present time, these levees are in private ownership and the owners thereof could deny access to the levees if they should so desire.

COMMENTS OF DEPARTMENT OF FISH AND GAME

Mr. Harry Anderson, Deputy Director of the Department of Fish and Game, interdepartmental communication dated March 12, 1962, submitted the following comments.

> Since the preliminary report was submitted for review we have had the opportunity to give greater consideration to all aspects of this project. The recommendations which follow parallel our previous recommendations but enlarge on them and provide greater detail. These comments and recommendations supersede all previous recommendations and constitute the official comments of this Department pursuant to P.L. 85–624, the Wildlife Coordination Act, and the general policy of the State regarding the protection and enhancement of fish and wildlife.
>
> Our review indicates that the Corps has not separated general recreational benefits from fish and wildlife benefits and the benefits assigned appear to be low. We believe the fish, wildlife and recreational benefits should be re-evaluated and raised.

On page 29, the report states "Hunting, trapping and related use of the general area has not been evaluated; however, any change in use due to the project is believed to be small and would not affect the overall recreation accomplishments of the project." We are not certain of the origin of this statement, but our investigation of the project reveals that a substantial amount of wildlife habitat will be inundated, or lost through changed land use patterns. These losses should be mitigated and recommendations are included for this purpose.

The Department investigated this project jointly with personnel of the Office of River Basin Studies, Fish and Wildlife Service, and in general concurs with their evaluation regarding benefits to improved anadromous and warm water fisheries. Our recommendations parallel those of the Fish and Wildlife Service.

Recommendations

1. In line with recent policy of the Department of Interior and the Wildlife Coordination Act, conservation and development of fish and wildlife resources should be included and authorized as project purposes.

2. That the Corps and the Bureau respectively provide the storage for and obtain the necessary water rights to, the quantities of water hereafter prescribed for the maintenance and enhancement of fishlife in the Stanislaus River; from Goodwin Diversion Dam, or if constructed, the proposed Knights Ferry Diversion Dam, to the confluence of the San Joaquin River; and that said water be released in accordance with the following schedule:

Period	Flow in cubic feet per second	
	Normal year	Dry year [1]
October 1 to December 31	200	150
January 1 to May 31	125	100
June 1 to September 30	100	50

[1] A Dry year is defined as one in which the natural inflow into Shasta, Trinity, Folsom, and Friant Reservoirs, as predicted for the water year, totals less than 5,000,000 acre-feet, or one in which the combined water storage in Shasta, Trinity, Whiskeytown, Folsom, Auburn, and New Melones Reservoir as predicted for the water year, is less than 5,000,000 acre-feet.

Provided: that if the average streamflow maintained in the Stanislaus River from October 1 to December 31 is greater than the minimum flow specified for this period (exclusive of flood spill and emergency releases) the streamflow from January 1 to May 31 be maintained at not less than the specified January 1 to May 31 minimum flow, or the average of the October 1 to December 31 flow minus 100 c.f.s. whichever is greater. *Provided further:* that fluctuations of the Stanislaus River downstream from Goodwin Diversion Dam be limited to a rate of change not exceeding 2 inches per hour or 8 inches in any 24-hour period.

Provided further: that during the period of October 1 to December 31 the water surface elevation not be reduced by more than 4 inches from elevations reached during flows in excess of those recommended (exclusive of flood spills and emergency releases). Water surface elevations shall be measured at Orange Blossom Bridge.

Provided further: that flow releases into the channel of the Stanislaus River downstream from the Goodwin Diversion Dam be derived from New Melones Reservoir outlets at or near elevation 560 feet m.s.l.

Provided further: that modifications of the above streamflow schedule, within the limits of the total quan-

tities of water involved, be permitted upon request of the California Department of Fish and Game and the Bureau of Sport Fisheries and Wildlife if found desirable for optimum fishery production and permissable [*sic*] without infringing upon prior project commitments.

Provided further: that upon request of the California Department of Fish and Game and the Bureau of Sport Fisheries and Wildlife flows be released into the channel of the Stanislaus River in sufficient quantity to flush from salmon and trout spawning areas any silt, fines, and other debris that may have been deposited as a result of project operation. If mechanical means are used in place of, or in addition to, flushing flows, the associated costs shall be a project cost.

3. That a minimum pool of 300,000 acre-feet of water be reserved in the reservoir for development of a reservoir fishery, wildlife conservation and general recreation purposes. Rapid and extreme fluctuations are to be avoided insofar as is consistent with project purposes, particularly during the fish spawning season, April through June.

4. Reservoir clearing plans be developed in cooperation with the Department of Fish and Game and U.S. Bureau of Sport Fisheries and Wildlife.

We believe about 2,500 to 3,000 acres of trees and brush could be retained in the reservoir area without affecting adversely other uses, and which will be highly beneficial to fish and small game. If left intact this could result in a savings of clearance costs on the order of $425,000 to $525,000 ($175.00 per acre) which could be applied to land acquisition for wildlife mitigation, and public access and recreation.

5. Acquisition by fee-title or easement of approximately 3,400 acres of privately owned riparian land along the Stanislaus River downstream from Knights Ferry Bridge. Under a general plan this riparian land would be devoted to management for fish and wildlife purposes to mitigate wildlife damages resulting from the project and to assure retention of riparian habitat and preservation of the spawning gravels of the river.

6. Withdrawal of 2,670 acres of Bureau of Land Management land adjacent to the east side of New Melones Reservoir. Land withdrawn under this paragraph would serve to mitigate wildlife habitat losses due to inundation. It is proposed that these lands can be managed as multiple purpose recreation lands including wildlife management under plans developed jointly by the Bureau of Land Management, Bureau of Sport Fisheries and Wildlife, and the California Department of Fish and Game. These lands would be managed by the State Department of Fish and Game.

7. Stringent controls be imposed on construction activities to prevent the destruction of fish and wildlife habitat in and adjacent to Stanislaus River.

8. The existing Melones Dam be breached so as to permit the free flow of subsurface water within New Melones Reservoir. The Department and the Bureau of Sport Fisheries and Wildlife should be consulted on this matter prior to breaching the dam.

9. A zoning plan should be established for the new reservoir to insure that specified areas of the reservoir will be available for fishing and hunting, and other fish and wildlife purposes without conflicting with other proposed recreational uses. The Department will be happy to cooperate with other interested agencies in the development of such a plan for recommendation to the appropriate regulatory agencies.

10. Such reasonable modifications be made in the project operation and facilities as may be agreed upon by the Corps of Engineers, the U.S. Fish and Wildlife Service, and the Department of Fish and Game for the conser-

vation and development of fish and wildlife resources.

11. Federal land and project waters, except such portions as may be reserved for public safety, protection of property and efficient operation, be open to the public without fee for the purposes of hunting and fishing.

12. Leases of Federal land in the project area reserve the right of public access without fee for the purposes of hunting and fishing.

13. In accordance with the recently announced Federal policy regarding land acquisition at Federal project for future development in the public interest; and to provide incidental and additional mitigation acquire an additional 4,560 acres of private land located on the eastern side of New Melones Reservoir. These lands would be managed for wildlife in accordance with a plan developed jointly by the Bureau of Sport Fisheries and Wildlife, Bureau of Land Management and the Department of Fish and Game.

14. Opportunity be provided to select and manage for fish and wildlife purposes other isolated parcels of land and lands contiguous to the reservoir acquired for project purposes.

15. Project funds in the amount of $25,000 be provided for development of lands under paragraphs 6, 13, and 14 for wildlife mitigation purposes.

In making these recommendations the Department has taken cognizance of the President's recent declaration and the most recent policies of the Departments of Interior and Army regarding Reservoir Project Lands. These policies are set forth by Secretary of the Interior in the Departmental Manual, Part 751 "Reservoir Projects Lands."

Specific reference is made to Section 751.1.1 of Chapter 1, Policies, and Section 751.1.4 Land

Acquisition. Among other things this policy states, "The fee title will be acquired to the following": "Such lands as are needed to meet present and future requirements for fish and wildlife as determined pursuant to the Fish and Wildlife Coordination Act."

The joint policy statement of the Departments of Interior and Army is identical in wording to the above. These policies were approved by the Secretaries of Interior and Army on February 16, 1962. * * *

Inclusion of all of the above recommendations will adequately protect and appreciably enhance fish and wildlife and recreation in the project area.

We appreciate the opportunity to review this report. The New Melones project affords an excellent opportunity for water development with protection and improvement of the State's fish and wildlife resources.

COMMENTS OF DIVISION OF HIGHWAYS

Mr. J. C. Womack, State Highway Engineer, by interdepartmental communication dated February 19, 1962, stated that he previously commented on the draft of the New Melones Review Report and that the comments made then are still valid. Additional comments were submitted as follows.

> The New Melones "* * * Review Report indicates on Plates I and III a proposed relocation for legislative State Highway Route 65. The Division does not necessarily concur in the location indicated and advises alternate routes must be given study before a recommendation can be made to the California Highway Commission regarding adoption of a route to supersede the portion of highway inundated. From one to two years will be required for the reconnaissance and public hearing phases of this

study in the two counties concerned before the design stage can be initiated."

COMMENTS OF DEPARTMENT OF CONSERVATION

Mr. W. D. Winters, Deputy State Forester, by interdepartmental communication dated March 6, 1962, submitted the following comments.

> It should be noted that the stream bed in the North Fork of the Stanislaus River and its principal tributaries, Rattlesnake Creek, Beaver Creek, Griswald Creek and Skull Creek, contain large deposits of debris, within the creek beds and adjacent slopes, that can be carried down stream during peaks of high water. There is a large program of work to be done in stream clearance that should be carried on prior to, or during, construction of the project, to eliminate some of the potential hazards to the catch basin of the reservoir.
>
> * * * * *

There are no Division of Forestry structures, power or telephone lines involved in the proposed reservoir below the contemplated high water level and no new stations or other facilities are contemplated at the present time or within the foreseeable future, in either ranger unit. This situation can change, however, depending upon recreational developments that may be installed and the use that such facilities may receive.

The Division of Forestry maintains the following roads and fire breaks within the area, for fire protection purposes. These facilities are all above contemplated high water level, except as noted under fire breaks:

Roads—Fowler Peak 4.5 mi.; Ponderosa Way 7.2 mi.; Raggio Mill 3.0 mi.; Hunter Pt. 4.0 mi.; Dorrington—Sour Grass 25.0 mi; McCormick Meadows 12 mi; Sour Grass 6.0 mi; Griswald Creek 9.5 mi; Lower Beaver 4.5 mi; Ramsey 4.0 mi; McCormick Lookout 2.0 mi; Burnt Corral 8.0 mi. Total road miles 89.7.

Firebreaks—Darby Knob 4.5 mi; Skunk Gulch 3.00 mi; Mariana Gulch 2.00 mi; Otter Bar 0.5 mi. Total Firebreak miles 10.

The lower portions of the last three firebreaks will be below the contemplated high-water level. However, this will in no way affect their usefulness for the purpose they were intended for. Shortened mileage will be the only effect.

No comment can be made, at this time, on other public and private roads, pending study of final plans and maps of the reservoir itself and proposed relocation of existing roads.

CONCLUSIONS

As a result of review of the New Melones Report by the various state agencies concerned, it is concluded that:

1. Optimum multipurpose development of the New Melones Reservoir site should be made for the purposes of flood control, water conservation, hydroelectric power, recreation, and fish and wildlife. Reservoir storage capacity of 2,400,000 acre-feet as planned in the report, is adequate for these purposes.

2. To be in conformance with objectives of The California Water Plan the New Melones Project should be subject to the rights of the upstream areas dependent upon waters of the Stanislaus River to use water required for the future development of such areas.

3. On the assumption that the Hogan Service Area will be served by an exchange of water from the Folsom South Canal and from New Hogan Reservoir, estimates of future upstream depletions as presented in the New Melones Report are reasonable.

4. The design of the dam and appurtenances are adequate and estimated project costs are reasonable.

5. The flood control aspects of the project are urgently needed.

6. The New Melones Project appears to be economically justified.

7. If adequate provisions are made for land acquisition and releases of water for stream flow maintenance, the New Melones Project will protect and enhance fish, wildlife, and recreation.

8. It has not fully been demonstrated that the channel downstream from Goodwin Diversion Dam is adequate to contain a flow of 8,000 cubic feet per second.

9. The New Melones Project does not adequately provide for the water needs of Calaveras and Tuolumne Counties and the Bachelor Service Area.

RECOMMENDATIONS

It is recommended that the proposed New Melones Project on the Stanislaus River be authorized by the Congress at an early date for construction and operation by the federal government; provided that:

1. Recognition be given to the right of the upstream areas dependent upon waters of the Stanislaus River to develop and utilize water required for the future development of such areas.

2. Water be released downstream for fisheries purposes and land be acquired for recreation and wildlife as previously recommended herein.

3. Studies be authorized to develop the full potential of the North Fork of Stanislaus River, including formulation of additional features of the New Melones Project designed to serve 30,000 acre-feet of water each year initially increasing to 50,000 acre-feet by the year 2015, for use in Upper Calaveras County. Further, that the Sonora-Keystone Investigation of the Bureau of Reclamation be programmed to formulate features of the New Melones Project to provide 30,000 acre-feet each year to the Sonora-Keystone area.

4. The Bachelor Service Area be served water from the New Melones Project or by an exchange from the Folsom South Canal.

Submitted by,

/s/ CARL A. WERNER,
Carl A. Werner,
Chief, Delta Branch.

Approved:

/s/ ALFRED R. GOLZE,
Alfred R. Golze,
Chief Engineer.

APPENDIX B

Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. 383, provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Sections 1(a) and 1(c) of the Flood Control Act of 1944, 58 Stat. 888, 33 U.S.C. 701–1 (a) and (c) provide:

> (a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). In-

vestigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations, and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation

of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

* * * * *

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall,

in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9(a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3 (a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.

Section 203 of the Flood Control Act of 1962, 76 Stat. 1180, 1191, provides in pertinent part:

SEC. 203. The following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and the supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided,* That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this title with funds from appropriations hereafter made for flood control so as to be ready for rapid inau-

guration of a construction program: *Provided further,* That the projects authorized herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements * * *.

The New Melones project, Stanislaus River, California, authorized by the Flood Control Act approved December 22, 1944 (58 Stat. 887), is hereby modified substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 453, Eighty-seventh Congress, at an estimated cost of $113,717,000: *Provided,* That upon completion of construction of the dam and powerplant by the Corps of Engineers, the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws, except that the flood control operation of the project shall be in accordance with the rules and regulations prescribed by the Secretary of the Army: *Provided further,* That the Stanislaus River Channel, from Goodwin Dam to the San Joaquin River, shall be maintained by the Secretary of the Army to a capacity of at least eight thousand cubic feet per second subject to the condition that responsible local interests agree to maintain private levees and to prevent encroachment on the existing channel and floodway between the levees: *Provided further,* That before initiating any diversions of water from the Stanislaus River Basin in connection with the operation of the Central Valley project, the

Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin and the diversions shall at all times be subordinate to the quantities so determined: *Provided further,* That the Secretary of the Army adopt appropriate measures to insure the preservation and propagation of fish and wildlife in the New Melones project and shall allocate to the preservation and propagation of fish and wildlife, as provided in the Act of August 14, 1946 (60 Stat. 1080), an appropriate share of the cost of constructing the Stanislaus River diversion and of operating and maintaining the same: *Provided further,* That the Secretary of the Army, in connection with the New Melones project, construct basic public recreation facilities, acquire land necessary for that purpose, the cost of constructing such facilities and acquiring such lands to be nonreimbursable and nonreturnable: *Provided further,* That contracts for the sale and delivery of the additional electric energy available from the Central Valley project power system as a result of the construction of the plants herein authorized and their integration with that system shall be made in accordance with preferences expressed in the Federal reclamation laws except that a first preference, to the extent as needed and as fixed by the Secretary of the Interior, but not to exceed 25 per centum of such additional energy, shall be given, under reclamation law, to preference customers in Tuolumne and Calaveras Counties, California, for use in that county,

who are ready, able, and willing, within twelve months after notice of availability by the Secretary of the Interior, to enter into contracts for the energy and that Tuolumne and Calaveras County preference customers may exercise their option in the same date in each successive fifth year providing written notice of their intention to use the energy is given to the Secretary not less than eighteen months prior to said dates: *And provided further,* That the Secretary of the Army give consideration during the preconstruction planning for the New Melones project to the advisability of including storage for the regulation of streamflow for the purpose of downstream water quality control.

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OCTOBER TERM, 1977

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vs.

UNITED STATES OF AMERICA,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUMMARY OF ARGUMENT

I.

In *Nebraska v. Wyoming,* 295 U.S. 40 (1935), and *Nebraska v. Wyoming,* 325 U.S. 589 (1945), this Court held that the Secretary of the Interior "must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator," and that the Secretary, in complying with state regulatory water laws, was in "compliance with that directive [in section 8 of the Reclamation Act of 1902]."

In *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275 (1958), *City of Fresno v. California,* 372 U.S. 627 (1963), and *Arizona v. California,* 373 U.S. 546 (1963), this Court

was called on to determine whether section 8 enables a state to contravene specific, identifiable reclamation policies established by Congress, a result which would enable the states to exercise a "veto power" over federal projects. The Court rejected the proposition that section 8 has this effect. In *Ivanhoe,* it held that state law could not override the historic, fundamental acreage limitation in section 5 of the Reclamation Act of 1902. In *Fresno,* it held that state law could not prevent the Secretary of the Interior from acquiring water which is the subject of private vested rights, under his condemnation powers in section 7 of the act; it also held that state law could not override the specific preference for water for irrigation uses found in the federal reclamation laws.

In *Arizona,* the Court held that sections 14 and 18 of the Boulder Canyon Project Act (BCPA), an act which provides for a series of reclamation projects that utilize the waters of many states, do not authorize the states to control federal water uses under the BCPA. This case is fundamentally different from the *Arizona* case, because the legislative history of the Reclamation Act of 1902 is fundamentally different from that of the BCPA. The legislative history of the BCPA indicates that Congress meant to provide for unitary federal control because of the interstate nature of the BCPA. However, the legislative history of the Reclamation Act of 1902 indicates that Congress solved the interstate problem under that act, by authorizing a state only to control the use of water destined for use in that state, regardless of where such water may arise.

In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. 152 (1946), this Court again rejected the state "veto power" theory, holding that sections 9(b) and 27 of the Federal Power Act do not authorize a state to prevent the construction, maintenance and operation of a power project licensed by federal officials under that act.

Thus, these cases merely hold that the states cannot contravene specific, identifiable congressional policies, and thus exercise a "veto power" over federal projects. They do not hold that, where state laws do not have that effect, state law is ineffective under section 8. In *Ivanhoe,* the Court expressly reached its decision "without passing generally on the coverage of § 8 in the delicate area of federal-state relations." 357 U.S. at 292. The United States relies on the *dictum,* not the holdings, of *Ivanhoe* and its progeny. If that dictum is construed as rejecting the state "veto power" argument, it is correct. If it is construed more broadly, it is inconsistent with the legislative history of section 8, and is wrong.

II.

The United States argues, on the one hand, that section 8 has no relevance to unappropriated water under the Reclamation Act of 1902, and thus does not require the Secretary to comply with state regulatory water laws; it argues that the Secretary complies with such laws only as a matter of "comity." If this is so, Congress would have inadvertently failed to provide a method for federal appropriation of unappropriated waters that were traditionally controlled by the states, and would thus have impaired the states' ability to quantify and manage their unappropriated waters. Moreover, the legislative history of section 8 clearly indicates that the Secretary must comply with state law in acquiring his water rights under the act.

The United States concedes that the legislative history "provides some support" for the proposition that the Secretary must comply with state water laws, and thus that

he does not do so as a matter of "comity." However, the United States argues that the legislative history might be construed as requiring the Secretary only to comply with the "forms" of state law, which the United States defines as including all state laws other than those that provide for regulatory control of water. This argument assumes a distinction that does not exist; the very purpose of the "forms" of state law is to provide for state regulatory control of water.

Moreover, the United States' argument is inconsistent with the legislative history of section 8. The United States argues that the section was amended, prior to its consideration in the House of Representatives, to provide for federal rather than state control of water. However, the purpose of the amendment was only to limit state control of interstate waters, not to otherwise transfer control from the states to the federal government. Indeed, in the debates in the House of Representatives *after* the amendment was made, several congressmen stressed that, even under the amended version of section 8, "distribution should be . . . regulated and controlled by state boards of engineers," "the appropriation and use of the water is under the State law," "Section 8 follows the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to these laws," and so forth. These and other statements, which belie the United States' "form" argument, were ignored in the United States' brief.

Section 8, in providing for state control of waters "used in irrigation," reflects the fact that the Reclamation Act of 1902 was intended only to provide works for "irrigation"

purposes. Subsequent congressional acts provided that the works could also be used for non-irrigation purposes, and the legislative history of the acts indicate that the provision of state control in section 8 was to apply to all project purposes, not just the irrigation purpose.

III.

Section 8 establishes a fundamental, historic principle of federal reclamation law, the principle of state control of water uses. The section literally imposes no limits on the scope of that principle. However, Congress has established other substantive policies in the field of reclamation law, in the Reclamation Act of 1902 and in supplementary laws adopted thereafter. A proper balance of these competing policies would limit the principle of state control to the extent that it is in conflict with other specific, substantive reclamation policies adopted by Congress, but would preserve the principle of state control to the extent that no such conflict exists. Applied here, a proper balance of these policies would allow California to control water uses of the New Melones Project, to the extent that California law does not impair the specific, basic purposes of the project or render it economically infeasible.

The United States argues that supplementary reclamation laws enacted by Congress in 1911, 1914, 1920 and 1939 provide a comprehensive reclamation scheme that vests the Secretary with exclusive discretionary control of water uses, thus leaving no room for state control of such uses. It argues, in effect, that section 8 has been repealed by implication. However, this Court frowns on repeals by implication. Moreover, these supplementary laws merely establish specific congressional policies that cannot be contravened by the states; nothing in the laws suggests an intent to nullify state laws which do not conflict with these

congressional policies. To the contrary, Congress consistently reaffirmed the principle of state control in these acts, and in other acts as well.

The United States argues that our view is "unworkable," because federal reclamation projects can be "efficiently" operated only under unitary federal control. It argues that our view will lead to increased litigation, that it will require the courts to determine which congressional policies are deemed to override state law, and so forth. In fact, our view is consistent with that which has been followed in historical practice. The Secretary has *consistently,* and *fully,* complied with state water laws, including those that provide for regulatory control of water. Even today, his regulations provide that "project plans must comply with State legal provisions or priorities for beneficial use of water." To argue, at this late date, that our view is "unworkable" is to argue that the entire federal reclamation program has been, since its inception, an historical failure.

Moreover, in enacting section 8, Congress clearly rejected the concept of unitary federal control. It apparently believed that this interest was outweighed by the interest of continuing and extending the tradition of state control of water, a tradition that had been approved by Congress in the acts of 1866, 1870 and 1877. It thus recognized that the states should be allowed to control the use of water that, under the act, was to be made available for local economic and municipal interests, and thus that would affect the pattern of economic growth in the states. Indeed, it would be anomalous to exempt the distribution of water under the act from state control, since such water is distributed to the same local economic and municipal interests that are otherwise subject to state control. Thus, Congress weighed competing interests in enacting the Reclamation

Act of 1902, and reached an accommodation of those interests which it believed to be protective of both national and local interests. The United States asks this Court to reweigh these interests, and overturn this accommodation.

The United States argues that, since the states are allowed to participate in the planning of federal projects, it would be "pointless" to allow them to control federal water uses after the projects are authorized. However, Congress cannot foresee all potential problems and concerns that may arise from its authorizing acts, and normally fails to make provision for all such problems and concerns. These problems and concerns typically involve matters of local rather than concern. Thus, there is no discernible national interest that precludes the states from developing their own reclamation schemes, in order to complement the congressional scheme. Indeed, this case provides an example of how California provided a balanced solution to a problem that was not anticipated by Congress. In authorizing the New Melones Project, Congress intended that the irrigation and power benefits would be made available for the East Side Division, a proposed addition to the Central Valley Project. However, Congress has apparently abandoned plans to build the East Side Division, and thus the congressional scheme for water use cannot be fulfilled. The Secretary has, to date, failed to develop an alternative plan for water use. Congress did not foresee these unusual circumstances. Thus, the State Board, applying traditional principles of western water law, deferred the Secretary's right to impound water for consumptive use until he develops a plan for its use. Rather than rendering the planning procedures "pointless," the State Board's decision bridges a gap that could not have been foreseen in the planning process.

IV.

Assuming that the doctrine of finality of judgments does not bar the United States from collaterally attacking the validity of the conditions of Decision 1422, the conditions are fully consistent with the purposes of the New Melones Project. The major conditions, Nos. 1 and 2, defer impoundment of water for consumptive use until the Secretary develops a plan for such use, and submits the plan to the State Board for approval. The United States does not argue that the conditions frustrate the congressional scheme for water use; it cannot make that argument, since the congressional scheme provides for distribution of water to the since-abandoned East Side Division. The United States does not argue that the conditions frustrate the Secretary's own scheme for water use; it cannot make that argument, since the Secretary has no such plan. Instead, the United States argues that the conditions "undermine the project's economic feasibility," by deferring full impoundment. However, it is the Secretary's failure to develop a plan for water use, not the conditions that defer his impoundment rights until he develops such a plan, that threatens to defer realization of the full benefits of the project. The United States was closer to the truth when it advised this Court in another case that the conditions of Decision 1422 do not "fundamentally alter its [the project's] value."

The United States argues that the conditions, in enabling the State Board to weigh the "benefits" and "damage" of the Secretary's future water use plan, may enable the State Board to frustrate project purposes at a future time, by denying water which is necessary to serve the congressionally-authorized purposes of the project. However, we concede that the State Board cannot, now or in

the future, deny water which is necessary to serve those purposes. Whether the State Board may act in contravention of that limitation cannot be determined here, but can only be determined when the State Board acts in response to the Secretary's future water plan.

The remainder of the conditions of Decision 1422 are minor, in that they merely require preferences for water uses that are already contained in the authorizing act, adopt the Secretary's own estimates of water needs, reserve jurisdiction to the State Board to impose new conditions on the basis of new facts, and so forth. These conditions do not substantially affect the way that the Secretary plans to operate the project, much less conflict with any congressionally-authorized purposes of the project.

The United States argues that Congress, in authorizing individual reclamation projects, provides a comprehensive reclamation scheme that vests the Secretary with absolute, exclusive discretion over water uses, and thus leaves no room for state control of water uses. The United States does not argue that state law in this case impairs his specific duties under the act. That is, the United States does not argue that the conditions forbid him to do an act that is mandated by the authorizing act, or mandate him to do an act that is forbidden by the authorizing act. Rather, it argues that the Secretary has exclusive discretion over water uses, and thus can override state water laws whenever he chooses to do so.

Under this view, section 8 would have no practical meaning or effect, because the section would never be applicable to individual projects authorized by Congress. Thus, in the final analysis, the United States asks this Court to judicially overturn a fundamental, historic principle of federal

reclamation law, the principle of state control in section 8. If that principle is to be overturned, such is the task of Congress, not this Court.

V.

Under the doctrine of finality of judgments, the United States cannot collaterally attack the validity of a prior decision, if the court or agency in the prior case had general jurisdiction to issue the decision. Therefore, the United States cannot collaterally attack the validity of the conditions of Decision 1422, but can only challenge the general jurisdiction of the State Board to impose conditions. If the result were otherwise, the United States would always be free to collaterally attack the validity of conditions, whenever it no longer wished to be bound by them. Under that result, the purpose of the doctrine of finality, which is to vest prior legal proceedings with certainty, would be subverted.

VI.

If the United States acquires its water rights under state law as a matter of "comity," it has the power to make an election as to whether or not to acquire its rights under state law. If it thus elects to acquire its rights under state law, it should be required to take both the benefits and burdens of state law, and thus should be required to comply with conditions in its permits.

VII.

When the Secretary acquires an assignment of state-filed permit applications, he receives a right that, however inchoate, has the benefit of an early priority date. If he elects to receive the benefit, he should be bound by conditions which the state attaches to the right.

ARGUMENT

Introduction

In our view, the easy question in this case is whether Congress provided for state control of water under the Reclamation Act of 1902; section 8 clearly establishes the fundamental principle of state control. The difficult question arises in reconciling the principle of state control with other substantive principles of federal reclamation law established by Congress, a difficulty which arises from the fact that section 8 does not specifically address the question. The United States argues, in essence, that the difficulties in reconciling these principles justifies the conclusion that the Secretary of the Interior should have absolute, exclusive discretionary control of water uses, a result which would result in the judicial abrogation of the fundamental principle of state control.

As we shall see, a proper interpretation of section 8 would apply the principle of state control only to the extent that the result does not impair Congress' other specific, substantive policies in the field of reclamation. These substantive policies can be fully preserved without the Secretary having exclusive control over water uses, and thus without abrogating the principle of state control. This result thus balances and harmonizes the fundamental principle of state control with other fundamental principles of federal reclamation law, rather than nullifies one principle in order to serve the others. Far from making Congress' reclamation goals unattainable, this result is that which has been followed in actual, historical practice under the federal reclamation program.

I. THE UNITED STATES HAS MISCONSTRUED PRIOR DECISIONS OF THIS COURT THAT INTERPRET SECTION 8.

The United States argues that this Court, in *Nebraska v. Wyoming*, 295 U.S. 40 (1935), and *Nebraska v. Wyoming*,

325 U.S. 545 (1945), failed to consider the meaning of section 8. U.S. Br. 38-40. It further argues that the Court subsequently interpreted the meaning of the section adversely to our position, in *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275 (1958), *City of Fresno v. California,* 372 U.S. 627 (1963), and *Arizona v. California,* 373 U.S. 546 (1963). Neither the Ninth Circuit nor the district court, in the proceedings below, viewed the latter decisions as controlling here. Indeed, the decisions support the view, which we urge, that section 8 should not be construed as authorizing the states to exercise a "veto power" over federal projects.

In its decision in the 1935 *Nebraska* case, this Court stated:

> "The bill alleges, and we know as a matter of law [citing section 8 of the Reclamation Act of 1902], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator . . . ." 295 U.S. at 43.

The United States seeks to obviate the effect of this decision by stating that it "does not here challenge the proposition that the Secretary 'must obtain permits and priorities for the use of water from the state . . . .'" U.S. Br. 41 n. 20. It fails to note, however, that it challenged that very proposition in its prayer for relief in this case. App. I, 19. See note 7, *infra.* It further fails to note that this proposition is at war with its argument that it acquires its water rights under state law as a matter of "comity," rather than under the directive of section 8.

In the 1945 *Nebraska* case, the Secretary had acquired appropriative permits from the State of Wyoming, which

were subject to several conditions imposed by Wyoming officials. 325 U.S. at 613. The United States' contracts with its customers provided that "after the stored water was released from the reservoir it was under the control of the appropriate state officials." *Ibid.* The Court stated that, under these circumstances:

> "We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state law in appropriating water for irrigation purposes. We have a compliance with that directive." *Id.* at 614-615.

The United States contends that the Court did not mean to consider the effect of section 8, and that the Court meant to avoid the question because the Secretary had in fact complied with state law. U.S. Br. 39. However, as noted in our opening brief, the question which the Court avoided was the *constitutional* question whether, in the absence of section 8, the Secretary could acquire his water rights independently of state law because of federal "ownership" of water. Pet. Br. 49 n. 37. The Court did not avoid the *statutory* question whether section 8 required him to acquire his water rights under state law. *Ibid.* The United States' argument, that the Court failed to consider the statutory meaning of section 8, is inconsistent with the Court's statement that "we have a compliance with that directive [in section 8]." 325 U.S. at 614-615.

Turning to *Ivanhoe, Fresno* and *Arizona,* it is helpful to understand the historical context in which those cases arose. The view had been urged, for many years prior to *Ivanhoe,* that section 8 vests the states with a broad "veto power" over federal projects authorized by Congress. See generally Trelease, "Reclamation Water Rights," 32 *Rocky Mtn. L. Rev.* 464, 467-468 (1960); Sax, "Problems of Federalism in

Reclamation Law," 37 *Univ. of Colo. L. Rev.* 49, 62-69 (1964). Under this view, the states would have the right to alter project purposes, or even deny water to the project altogether, whenever the state deemed such to be in the public interest. *Ibid.* It was argued that, since section 8 literally imposes no limits on state control, none should be implied. *Ibid.* Under this view, the states would have the right to nullify the federal reclamation investment, whenever the state regarded that investment as unsound or unwise. This was, in essence, the view that was urged on this Court in the *Ivanhoe, Fresno* and *Arizona* cases.

The Court properly responded that, where there is a clash between specific federal and state policies, the state policy must yield, notwithstanding section 8. It reaffirmed the proposition, voiced in the 1945 *Nebraska* decision, that, "where *Congress* has provided a system of regulation for federal projects, it must [not] give way before an inconsistent state system." 325 U.S. at 615. (Emphasis added.) Thus, in *Ivanhoe,* following the view urged by *both* the United States and California,[1] the Court rejected the proposition that section 8 enables a state to override the "specific and mandatory" acreage limitation in section 5 of the Reclamation Act of 1902, a limitation that has represented "national policy for over half a century." *Id.* at 291-292. In *Fresno,* the Court rejected the proposition that a state can prevent the Secretary from acquiring water under his condemnation powers, as found in section 7 of the Reclamation Act of 1902; it further rejected the proposition that a state can override the specific provision, found in section 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1194, as amended 43 U.S.C. § 485h(c), that requires a preference for

1. Thus, the Court stated that "there is no clash here between the United States and the State of California." 357 U.S. at 279.

water for irrigation purposes over municipal purposes. 372 U.S. at 629-630.[2]

In *Arizona,* without focusing on any specific state law, the Court rejected the proposition that sections 14 and 18 of the Boulder Canyon Project Act (BCPA), 45 Stat. 1057, 43 U.S.C. §§ 617m, 617q, enable the states to exercise *unlimited* control over federal water uses, which would have enabled the states to exercise a veto power over the BCPA. 373 U.S. at 579-585; Pet. Br. 53 n. 40. Any other result would have potentially frustrated the purposes of the BCPA, for Arizona's opposition to the BCPA was well known, and had been expressed to this Court. See *United States v. Arizona,* 295 U.S. 174 (1935). Against that historical backdrop, this Court responded that the legislative history of the BCPA evinced a clear congressional intent to provide for absolute federal control of water, and that, in light of the interstate nature of the project, any other result may subject the project to the "varying, possibly inconsistent commands of different state legislatures." 373 U.S. at 589-590. However, the legislative history of the Reclamation Act of 1902, which was not examined by the Court, is entirely different from the legislative history of the BCPA. Moreover, the BCPA is fundamentally different from the vast majority of projects authorized under the Reclamation Act of 1902, since 85% of the latter projects serve users

2. The United States also argues that our position is inconsistent with the decision in *Turner v. Kings River Cons. Dist.,* 360 F.2d 184 (9th Cir. 1966). U.S. Br. 56 n. 33. There, the Ninth Circuit held that state law cannot prevent the Secretary from acquiring water already appropriated by others, under his condemnation powers in § 7 of the Reclamation Act of 1902. Thus, the decision is similar to that in *Fresno,* and in fact relied on the *Fresno* analysis. Indeed, the Secretary was not even required to obtain an appropriative permit under California law in that case, since California law requires such a permit only where an applicant seeks *unappropriated* waters. Cal. Wat. Code § 1375.

within a single state. See Sax, "Problems of Federalism in Reclamation Law," 37 *Univ. of Colo. L. Rev.* 49, 56 (1964). Thus, the potential problem of interstate conflicts does not exist with respect to most projects authorized under the latter act. To the extent that the problem might exist, Congress solved the problem in 1902 by amending section 8 to allow a state only to control water which, under interstate compacts or interstate stream adjudications, is destined for use in that particular state, regardless of where the water may arise. See page 30, *infra.*

Prior to *Ivanhoe,* the state "veto power" argument had been raised, and rejected, in another context. In *First Iowa Hydro-Electric Cooperative v. FPC,* 328 U.S. 152 (1946), the State of Iowa argued that sections 9(b) and 27 of the Federal Power Act (FPA), 41 Stat. 1063, 1068, 1076 (1920), 16 U.S.C. §§ 791a, 802(b), 821, which contain language analogous to section 8 of the Reclamation Act of 1902,[3] authorized Iowa to license the construction and operation of a power project regulated under the FPA. Iowa law provided that "no dam shall be constructed, maintained, or operated" in Iowa without a license issued by Iowa authorities. 328 U.S. at 164, 165, 166. Accordingly, Iowa maintained that it had a "veto power" over the construction, maintenance and operation of the project, *id.* at 164, notwithstanding that Congress had authorized federal authorities to license the construction, maintenance and operation of the project. The case thus raised the question whether a state could veto a project that had been authorized by Congress, and did not involve water rights at all; in fact, the licensee had already acquired "options upon 98% of the riparian rights" in the portion of the river

3. However, §§ 9(b) and 27, unlike § 8, do not require the Secretary to "proceed in conformity with" state laws.

affected by diversions for the project. *Id.* at 158. The Court properly rejected Iowa's argument, ruling that the federal government has exclusive authority to license the construction and operation of such projects. The analogous argument, applied here, would be that section 8 authorizes the State Board to exercise a veto power over the construction, maintenance and operation of the New Melones Project. It is clear that the State Board does not have such power, nor do we argue otherwise. This Court properly refrained from relying on *First Iowa* in its subsequent consideration of section 8 in *Ivanhoe* and *Fresno,* and should also refrain from doing so here.

Thus, *Ivanhoe, Fresno, Arizona* and *First Iowa* rejected the argument, which we do not urge, that the states have the power to veto federal projects.[4] These cases did not consider the more difficult question, raised here, whether the Secretary must comply with state water laws, where there is no conflict between specific state and congressionally-defined policies. In fact, the Court in *Ivanhoe* expressly avoided "passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field." 375 U.S. at 292.

The United States relies on the *Ivanhoe* dictum that "we read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State." 357 U.S. at 292. This dictum was repeated in *Fresno* and

4. The United States argues that some of the conditions of Decision 1422 enable the State Board to adopt *future* conditions that may effectively frustrate, and thus potentially veto, the congressional aims for the New Melones Project. U.S. Br. 66, 75-78. As we note later, we do not construe any such condition as having that effect. See pages 54-55, *infra.* If any condition is construed as having that effect, it would be overly broad. However, it is premature to determine whether any future condition might have that effect, since that determination can only be made when, and if, such future conditions are imposed.

Arizona. 372 U.S. at 630; 373 U.S. at 586. The dictum was, of course, unnecessary to the decisions. Even so, the dictum is consistent with our views, if the dictum is construed as rejecting the theory that the states have a veto power over federal projects. If the dictum is not so construed, it is inconsistent with the legislative history of section 8; indeed, none of the decisions even referred to that legislative history. As Dean Meyers points out in his amicus brief, "From an easy case that made good law, . . . this Court has pushed the *dictum* of *Ivanhoe* to the point that Section 8 has no meaning at all." Amicus Curiae Brief of Charles J. Meyers, 12.

II. THE UNITED STATES MISINTERPRETS THE MEANING OF SECTION 8, AS REVEALED BY ITS LANGUAGE, LEGISLATIVE HISTORY AND ADMINISTRATIVE PRACTICE AND INTERPRETATION.

A. The United States' "Comity" and "Form" Arguments.

The United States argues that section 8 has two limited effects, neither of which requires the Secretary to acquire his water rights under state law. U.S. Br. 129-133. First, the section merely "reaffirms" the doctrine that the western states are free to apply their water laws to private appropriators, with respect to waters other than those acquired under the 1902 act. *Ibid*. Second, the section requires the Secretary to pay compensation to private water users whose vested rights, as defined by state law, are condemned by the Secretary under section 7 of the 1902 act. *Ibid*.

Under this view, section 8 would have no relevance to unappropriated water acquired under the 1902 act. To the extent that the section "reaffirms" the states' authority to control the use of non-project waters by private users, the section would have no relevance to *any* water acquired

under the act.[5] To the extent that the section provides that state law defines the vested rights which are condemned by the Secretary under section 7, the section would have relevance only to water already appropriated by others; it would have no relevance to *unappropriated* water. Under the United States' analysis, section 8 would impose no obligation on the Secretary to comply with state law in acquiring unappropriated water. He would comply with state law only as a matter of "comity." U.S. Br. 141.

The United States' "comity" argument creates conceptual and practical difficulties, which the United States has yet to address. Under its view, Congress would have provided a method for the federal acquisition of waters already appropriated by others, but would have failed to provide a method for the federal acquisition of unappropriated waters. Accordingly, Congress would have failed to provide a method for administrative quantification of the federal water right, thus impairing the states' ability to manage and allocate their unappropriated waters even among private appropriators. Pet. Br. 43-45. It can hardly be imagined that Congress overlooked a major concern of the federal reclamation program, which is how the Secretary acquires unappropriated waters that were traditionally controlled by the states.[6]

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5. If § 8 merely "reaffirms" the states' authority to apply their water laws to private appropriators, it would add nothing to the fabric of federal law. This Court has held, in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that the congressional acts of 1866, 1870 and 1877 already provide the same authority to the states. The United States notes that this matter was not always free from doubt. U.S. Br. 130. However, it is difficult to understand why Congress, in an act intended to provide for storage and use of water for reclamation purposes, would insert a provision in the act that has nothing to do with such water.

6. The specific language of § 8 indicates that Congress did not overlook this concern. The section, in describing the Secretary's obligation to "proceed in conformity with" state laws, refers to

Aside from state law, the federal reserved rights doctrine provides the only method of which we are aware for the federal acquisition of unappropriated water, where Congress has failed to expressly provide for a federal right. See, *e.g., Cappaert v. United States,* 426 U.S. 128, 138-142 (1976). However, the United States properly concedes that it lacks a reserved right, at least with respect to the New Melones Project. U.S. Br. 21 n. 17. If the Secretary lacks a reserved right, he stands in the same shoes as private appropriators, who must acquire their rights under state law. *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935). Thus, the United States fails to answer the basic question which it has ignored in this litigation, What is the source and nature of the federal right? Either the Secretary acquires his rights under the reserved rights doctrine, or he acquires his rights under state law. The United States concedes that the Secretary does not acquire his rights under the former theory, and denies that he acquires his rights under the latter. Thus, the United seeks the judicial creation of a new theory of water law, one that it has failed to define.

state laws relating to the "control, appropriation, use, or distribution" of water, *"or with any vested right thereunder."* (Emphasis added.) The latter, emphasized reference was intended to protect vested rights. However, since that reference is disjunctive, it is clear that the earlier reference—to state laws relating to the "control, appropriation, use, or distribution" of water—is not limited to vested rights, if it includes vested rights at all.

The United States cites a statement of Congressman Martin during the 1902 congressional debates, in which Martin indicated that § 8 requires the Secretary, when condemning vested rights under § 7, to "proceed in conformity with" state laws. 35 Cong. Rec. 6759; U.S. Br. 133. Martin's statement merely indicates that the Secretary must recognize rights vested under state law, and does not support the United States' argument that the Secretary is free to ignore state law in acquiring unappropriated water independently of § 7.

Because of the difficulties of its "comity" argument, the United States concedes that section 8 may require the Secretary to comply with state law in acquiring unappropriated water. U.S. Br. 137.[7] However, it argues that the section only requires the Secretary to comply with the "forms" of state law, which, as defined by the United States, consist of all state laws other than those that result in regulatory control of water. *Ibid.*

The difficulty with the United States' "form" argument is that it improperly assumes that the "form" of state appropriation laws can be divorced from state regulatory control of water; it thus assumes a distinction that does not exist. As noted in our opening brief, the appropriation doctrine was developed in the western states to provide for state control of the "beneficial use" of water, a matter of vital importance in the water-scarce western states; by thus controlling the "beneficial use" of water, the states were able to allocate and manage their limited water resource. Pet. Br. 31-34.[8] Thus, to argue that the Secretary is only subject

7. Since the United States concedes that the Secretary must at least comply with the "form" of state law, there is no basis for its suggestion that this Court should refrain from considering whether he is required to do so. See U.S. Br. 20. Indeed, the United States requested a judicial resolution of that very question in its complaint for declaratory relief, App. I, 19, and the lower court, responding to the United States' request, resolved the question against the United States. Since the United States is responsible for this issue now being before this Court, the United States should not be heard to argue that the issue should not be further considered.

8. In discussing the appropriation doctrine in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935), the Court stated:

> "[T]he right to the use of waters for mining and other *beneficial purposes* in California and the arid region generally was fixed and *regulated* by local rules and customs. . . . The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a *beneficial use* was entitled to protection;

> and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary laws and usage as well." (Emphasis added.)

The Pyramid Lake Tribe of Indians (hereinafter "amicus tribe"), analyzing history differently from this Court's analysis in the *Beaver Portland* case, argues that the western states did not traditionally determine beneficial use in granting water rights, but instead ministerially granted such rights if unappropriated water was available. Amicus Tribe Br. 11-12. Its argument distorts history. According to Wiel, Wyoming was the pioneer state to develop an administrative permit system as the basis for granting water rights; by 1911, this system had also been adopted in Idaho, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah and, in part, by Colorado. 1 Wiel, *Water Rights in the Western States* 435 (3d ed. 1911) (hereinafter "Wiel"). Under this system, a permit could be denied by a state engineer if the applicant failed to show that his proposed use was beneficial, and was in the public interest. *Id.* at 439-440, 442, 444; 2 Wiel 1557-1558. In some states, the permit provided for alteration of the natural flow of a river, when necessary to provide for the most beneficial use of water. 1 Wiel 439-440. Permit applications could be, and were, opposed by those who claimed that the proposed use was not in the public interest, and that the protestant had an alternative plan that was more in the public interest. *Id.* at 442. Permit applications were frequently rejected, particularly by the States of New Mexico and Nebraska, if the applicant was unable to show that his proposed use was in the public interest. *Id.* at 444-445, 446. Although the tribe states that Wiel characterized the powers of state engineers as "ministerial," Amicus Tribe Br. 11 n. 14, Wiel makes clear that their power was ministerial only in the sense that it was subject to judicial review. *Id.* at 436. On balance, the permit system formed "the basis of the water code system" of the western states, and established "the principle of centralized public control and regulation." 2 Wiel 1096.

The tribe also points out, as we indicated in our opening brief, that the permit system has not been adopted in all western states, in that Colorado and Montana utilize a judicial rather than an administrative system for the acquisition of water rights. Amicus Tribe Br. 12 n. 14; Pet. Br. 33 n. 25. That the water laws of all western states are not precisely uniform, and have developed in response to different local conditions, is as irrelevant as it is unsurprising. The tribe also points out that, at the time of the passage of the Reclamation Act of 1902, the water laws of the western states were not as "highly developed" as they are today. Amicus Tribe Br. 12 n. 14. This observation suggests only that the states' water laws are better able to protect the beneficial use of water now

to the "form" of state appropriation laws is to suggest that the very purpose of those laws—to provide for state control of water allocations— cannot be fulfilled. Stated differently, most western states developed a permit system as the basis of their appropriation laws. *Ibid.* Under these systems, a permit is issued subject to conditions which the state imposes to protect the "beneficial use" of water; thus, the permit, as limited by conditions, constitutes a states' recognition that water is being used in the public interest. To suggest that a state must issue a permit, but cannot impose conditions to protect the "beneficial use" of water, is to defeat the very purpose of the permit system. Thus, the result urged by the United States is little more than an empty formalism, one that denies a state's traditional power to fix duties to the rights which it grants.

B. Language of Section 8.

The United States' "comity" and "form" arguments are inconsistent with the language of section 8. The section requires the Secretary to "proceed in conformity with" the "appropriation" laws of the western states. The section thus requires the Secretary to satisfy the state that his proposed water uses are consistent with the "beneficial use" of water, and thus subjects his rights to state regulatory control. Thus, within the limitations described more fully later, see pages 57-61, *infra*, the states exercise the same regulatory control over the federal water right that they exercise over other water rights. This result is confirmed by the language in section 8 that specifically subjects the Secretary's rights to state laws relating to "control" of the "use" and "distribution" of water. Thus, the section pro-

than before, and that Congress was thus justified in its expectation that § 8 would lead to the development of a more "perfect" system of water laws in the western states. See, *e.g.*, H.R. Rep. No. 1468, 57th Cong., 1st Sess. 7 (1902).

vides no basis for an argument that the Secretary complies with state law as a matter of "comity," or that he need only comply with the "form" of state law.[9]

This result also appears from the proviso in section 8 providing that "beneficial use shall be the basis, the measure, and the limit of the right." Pet. Br. 18. In effect, this

9. Advancing a technical argument that was not raised below, the United States argues that § 8, in providing for state control of water "used in irrigation," does not provide for state control of water used for non-irrigation purposes. U.S. Br. 126. The "irrigation" reference in § 8 reflects the fact that the Reclamation Act of 1902 was enacted to provide for the "construction of irrigation works," 32 Stat. 388 (1902), not non-irrigation works. Congress subsequently amended the act to provide for the use of water for non-irrigation purposes. 41 Stat. 451 (1920), 43 U.S.C. § 521. The legislative history of the latter act indicates that Congress meant to extend the principle of state control, found in § 8, to non-irrigation water. See page 40, *infra*. Thus, when Congress authorizes a project that is to be "operated pursuant to the Federal reclamation laws," as it did with respect to the New Melones Project, 76 Stat. 1191 (1962), it means to provide for state control of water used for all purposes, not just irrigation purposes.

If the result were otherwise, § 8 would have no relevance to non-irrigation uses even under the United States' narrow interpretation of the section. Thus, the Secretary would not even be required to pay compensation for vested rights, as defined by state law, when he acquires such rights by the condemnation process. In *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), the Court rejected that result, holding that § 8—even as applied to non-irrigation uses of a multiple-purpose project—at least requires the payment of compensation for federal condemnation of vested rights.

Moreover, the United States' argument is contrary to the historical administrative practice under the Reclamation Act of 1902, a practice that is entitled to "great deference" by this Court. See *Udall v. Tallman*, 380 U.S. 1, 16 (1964). The Bureau, in complying with state laws under § 8, Pet. Br. 36-40, has never differentiated between the irrigation and non-irrigation purposes of projects. In California, for instance, it has consistently applied for permits, and complied with conditions therein, relating to *all* project purposes, not just irrigation purposes. See, *e.g.*, Df. Ex. 1, pp. 1-3 (App. II, 3-4); II Engle, "Central Valley Project Documents" 544-545, 547, containing H.R. Doc. No. 246, 85th Cong., 1st Sess. (1957).

Moreover, the United States' argument would lead to an administratively illogical result. If its argument were correct, Congress would have provided a method for the acquisition of water rights

proviso insures that water rights exist under the act only to the extent that they meet the "beneficial use" test. As noted above, the "beneficial use" test is the basis of the states' appropriation laws. In fact, it has no other significance under federal law. At the time that the 1902 act was passed, the water laws of the western states were in a state of transition from the riparian doctrine to the appropriation doctrine. Pet. Br. 31-34. Under the riparian doctrine, a water right is tied to the contiguity of land and water, and, in its common law form, is not subject to state regulatory control. *Ibid.* Under the appropriation doctrine, a water right is tied to a state determination of the "beneficial use" of water, and thus is subject to state regulatory control. *Ibid;* see 1 Wiel 406-412. Congress inserted the proviso in section 8 to encourage the transition from the wasteful riparian doctrine to the efficient appropriation doctrine in the arid western states. It expressed the hope that the proviso would encourage the development of "perfection and uniformity" in western water laws, H.R. Rep. No. 1468, 57th Cong., 1st Sess. 7 (1902), a hope which was largely fulfilled. Pet. Br. 33 n. 25. Thus, the proviso limits state control by giving effect only to state laws based on the "beneficial use" concept, but—more importantly here—provides that state laws based on that concept are the source of water rights under the act.

for irrigation purposes in § 8, but would have inadvertently failed to provide a method for the acquisition of water rights for other purposes. Thus, the procedures for the acquisition of water rights would be different, depending on which project purpose is involved. Moreover, the standard for determining whether the water right should be granted would also be different; water rights for irrigation purposes would be subject to the "beneficial use" test in § 8, see Pet. Br. 19 n. 14, and water rights for other purposes would not be subject to this test. Thus, if a state has authority to determine the "beneficial use" of water for irrigation purposes under § 8, there is little reason to deny its authority to determine the "beneficial use" of water for subsidiary project purposes.

C. Legislative History of Section 8.

The United States' "comity" and "form" arguments are inconsistent with the legislative history of section 8. For instance, Congressman Mondell declared, during the House debate, that the section requires the Secretary "to make the appropriation of the necessary water by giving the notice and complying with the forms of law" of the state. 35 Cong. Rec. 6676. The United States concedes that this statement "provides some support" for rejection of its "comity" argument. U.S. Br. 137. However, it argues that the statement is not inconsistent with its "form" argument. *Ibid.* Without arguing whether the statement can be construed as exempting the Secretary from state regulatory control of water, it is clear from other statements of Congressman Mondell and other congressmen that no such exemption was intended. For instance, Congressman Mondell stated that section 8 "follows the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to these laws." *Id.* at 6670. Congressman Burkett stated that, under section 8, "distribution should be . . . regulated and controlled by State boards of engineers." 35 Cong. Rec. 6728. Congressman Sutherland stated that "the appropriation and use of the water is under the State law. . . ." *Id.* at 6770.[10] These congressional statements and others, see Pet. Br. 26-29, indicate that Congress

10. A more complete description of the legislative history, as it bears on § 8, appears at pages 23-29 of our opening brief.

The United States acknowledges that President Roosevelt advocated the enactment of a national reclamation bill, under which the "distribution of water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws. . . ." 35 Cong. Rec. 6775; U.S. Br. 125 n. 93. However, the United States argues that the President meant only to indicate that the settlers should control supplementary distribution facilities which are built by the settlers. *Ibid.* Nothing in the President's

meant to subject the Secretary's water rights to state regulatory control, and thus belie the United States' "form" argument. Unable to reconcile its "form" argument with these ample congressional assurances, the United States simply ignores them in its brief.[11]

Instead, the United States notes that several congressmen emphasized that reclamation was an undertaking of "national concern," and thus that Congress should provide for federal construction and operation of the projects. U.S. Br. 118. As noted in our opening brief, these statements were addressed to the question, not relevant here, whether Congress should undertake a national reclamation program, or instead should cede lands to the states so that they could undertake their own programs. Pet. Br. 20-21.[12] The

statement supports this conclusion. It is apparent that the President, who was a Republican, meant to endorse the provision in the Republican party platform for 1900, which encouraged the establishment of a federal reclamation program, "reserving control of the distribution of water for irrigation to the respective States and Territories." Pet. Br. 26.

11. However, the United States cites another statement by Congressman Mondell who, after describing the tradition of state control of water approved by the congressional acts of 1866, 1870 and 1877, stated that it is "deemed wise to continue our policy in this regard." *Id.* at 6679; U.S. Br. 132 n. 101. The United States argues that this statement shows that Congress did not mean to continue the tradition with respect to water acquired under the 1902 act, an argument that is both illogical and inconsistent with the other statements described above.

12. Congressmen Mondell, Reeder and Newlands, in the statements cited by the United States, see U.S. Br. 119, argued only that the states, for financial and other reasons, were not equipped to undertake their own reclamation programs, and thus that the federal government should undertake such programs. Pet. Br. 20-21.

The United States also cites a statement of Congressman Robinson who, speaking in opposition to the reclamation bill, stated that the states would be "governed [from] 2,000 and 3,000 miles away." 35 Cong. Rec. 6671; U.S. Br. 134. However, Robinson was speaking in opposition to the concept that Congress should enter the field of reclamation, and was not addressing the meaning of § 8.

statements do not address the question, raised here, whether the Secretary must comply with state law in acquiring and using water under the federal program. Thus, the statements do not bear on the meaning of section 8. The United States apparently suggests that, if the federal government is to build and operate the projects, it need not comply with state laws in acquiring and using water. This conclusion might be logical if Congress had not enacted section 8. In enacting that section, Congress apparently believed that the interest of providing for unitary federal control of the projects was overridden by the interest of continuing and extending the tradition of state control of water.

The United States concedes that section 8, as passed by the Senate, contained a "strong States' rights provision." U.S. Br. 121. However, the United States argues that, prior to its consideration in the House of Representatives, the section was amended to provide for federal rather than state control of water. *Id.* at 120-126. The amendment was worked out in a meeting between President Theodore Roosevelt and a congressional delegation, the primary purpose of which was to strengthen the anti-monopoly provisions in section 5. Pet. Br. App. 2a n. 1. At the meeting, it was agreed to delete a provision in section 8 providing that state laws "govern and control" water, and substitute therein the provision requiring the Secretary to "proceed in conformity with" state laws. It is difficult to understand how a provision requiring the Secretary to "proceed in conformity with" state law can be construed as providing for federal rather than state control of water. In fact, the debate in the House of Representatives, which occurred *after* the amendment was made, makes clear that section 8 provides for state rather than federal control of water,

and thus that the amendment did not substantially change the effect of the section. Pet. Br. 25-29.

Other indicia support our conclusion. The leading congressional authority on reclamation, Congressman Newlands of Nevada, stated that the amended bill was "identical in its provisions, though differing somewhat in phraseology," with the original bill, and that the amended bill was "absolutely in harmony with the original bill." 35 Cong. Rec. 6673-6674.[13] He further stated that the amended bill was "in harmony with the platforms" of the political parties, *ibid.*, which in turn urged the passage of a national reclamation bill "reserving control of the distribution of water for irrigation to the respective States and Territories." Pet. Br. 26. Further, the House report described the amendment as one of several "minor amendments." H.R. Rep. No. 1468, 57th Cong., 1st Sess. 5 (1902).[14]

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13. The United States argues that Newlands meant only to suggest that the amended bill was harmonious with a bill which Newlands had introduced in the House of Representatives, rather than with the original Senate bill, S. 3057. U.S. Br. 122 n. 91. The United States overlooks the fact that the Newlands bill was identical to the original Senate bill. See H.R. Rep. No. 794, 57th Cong., 1st Sess. 5 (1902). Section 8 of both bills was also identical, in providing that state law would "govern and control" water. *Compare* H.R. Rep. No. 794, 57th Cong., 1st Sess. 17-18 (1902), *with* S. Rep. No. 254, 57th Cong., 1st Sess. 9 (1902). Thus, in stating that the amendment was harmonious with his own bill, Newlands clearly indicated that the amendment was harmonious with the original Senate bill.

14. The United States' interpretation of the legislative history rests primarily on a statement of Congressman Robinson during the congressional debates, and an autobiographical statement of President Roosevelt. U.S. Br. 123. Our analysis of these statements appears in our opening brief, at pages App. 3a-5a. Robinson's statement, delivered in the course of his opposition to § 8, was admittedly based on "newspaper accounts," 35 Cong. Rec. 6670, which suggests that the United States attaches greater weight to a hearsay account of a newspaper article than to the original article itself. See note 16, *infra*. In any event, Robinson's statement sug-

As explained in our opening brief, the purpose of the amendment was merely to limit the authority of an upstream state to control the waters of an interstate river, thus depriving users in a downstream state of a fair share of the waters. Pet. Br. App. 1a-5a.[15] This conclusion is

gested only that the President's intervention resulted in a "blending" of the views favoring federal and state control. *Ibid.*

Moreover, Robinson's statement was immediately repudiated by Congressman Newlands who, unlike Robinson, was a participant in the meeting between the President and the congressional delegation. As noted above, Newlands stated that, "if the gentleman [Robinson] will examine the bill, . . . he will find that it is identical in its provisions, though differing somewhat in the phraseology," with the original bill. 35 Cong. Rec. 6673-6674. The United States argues that Newlands, in repudiating Robinson, meant only to indicate that the anti-monopoly provisions of the amended bill, found in § 5, were harmonious with those of the original bill. U.S. Br. 124 n. 92. The United States is apparently confused by Newlands' statement that the meeting was called for the limited purposes of strengthening those anti-monopoly provisions. Pet. Br. App. 2a n. 1. In fact, Newlands, in repudiating Robinson, was responding directly to Robinson's hearsay statement that the provision for state control had been substantially changed, which is the same hearsay statement that forms the basis of the United States' interpretation of the amendment. By stating that the *entire* amended bill was in harmony with the original bill, 35 Cong. Rec. 6673-6674, Newlands clearly indicated that the provision of state control had not been substantially modified.

President Roosevelt's autobiographical statement, published 18 years after the events described, is sufficiently vague to support the version of either California or the United States, assuming that it is admissible. Pet. Br. 4a-5a.

15. Thus, there is no basis for the United States' argument that § 8 may lead to a conflict between the appropriation laws of different states, where a federal reclamation project utilizes interstate waters. U.S. Br. 90-91. As a result of the amendment, a state can only control the use of water which, as the result of interstate compacts or interstate stream adjudications, is destined for use within the state, regardless of where such waters may arise. Indeed, the hypothetical conflict posed by the United States cannot arise with respect to the vast majority of federal reclamation projects, since, as of 1963, 85% of the projects served users within a single state. See pages 15-16, *supra*. Assuredly such a conflict cannot arise here, since the waters of the Central Valley Project, including the New Melones Project, arise and flow solely in California.

confirmed by a contemporaneous newspaper account of the meeting between the President and the congressional delegation, as follows:

> "Congressmen Sutherland and Mondell strenuously insisted upon the provision for local control remaining in the bill, calling attention to the fact that each of the arid States had passed laws which were the result of years of experience . . .; that these laws were now recognized as controlling the waters, but if the matter were turned over to national control much confusion and friction would result; . . . that inasmuch as it was purely a local matter the people of the various States were in a better position to control the subject than officials in Washington two or three thousand miles away . . . .
>
> "The President substantially acquiesced in this view, but expressed the fear that if the provision that State laws shall control the appropriation of water should remain in the bill, it might be construed as permitting individual States to deny the right of citizens of one State to take water from another, and it was finally agreed that the bill should be so amended as to preclude any construction which would permit any State to deny to the citizens of another State the right to take water from the former into the latter." App. II, 114-115.[16]

16. This account was found in the collected papers of Congressman (later Senator) Newlands of Nevada, at Yale University Library. See Affidavit of Richard C. Jacobs in support of Motion to Augment Record and Request to Take Judicial Notice, 3-4, filed April 6, 1976. Since Newlands was the leader of the congressional delegation which met with President Roosevelt, there is a strong likelihood that the account maintained in his collected papers contains an accurate description of the meeting. Indeed, the account is consistent with Newlands' subsequent remarks, during the House debate, that the amended bill was "identical in its provisions, though differing somewhat in phraseology," with the original bill, and that the amended bill was "absolutely in harmony with the original bill." 35 Cong. Rec. 6673-6674. The Ninth Circuit originally denied our motion to have the newspaper account included

D. Administrative Interpretation of Section 8.

The United States argues that its position is not inconsistent with the Secretary's administrative interpretation and practice under the Reclamation Act of 1902. U.S. Br. 138. Its argument is internally inconsistent. On the one hand, it argues that the administrative practice supports its view that the Secretary must only comply with the "forms" of state law. U.S. Br. 140. On the other hand, it argues that the administrative practice supports its view that the Secretary need only comply with state law as a matter of "comity." U.S. Br. 141. In fact, the Secretary's practice supports neither argument. The Secretary has *consistently,* and *fully,* complied with state regulatory water laws, and the United States does not argue otherwise.[17] For instance, the Secretary has consistently acquired appropriative permits under California law, and has consistently complied with conditions in the permits. See Pet. Br. 36. The United States suggests only that the Secretary's historic compliance with state law was not pursuant to the directive in section 8, but was pursuant to "comity." Thus, the United States admits the deed, and denies only the motive.

In fact, the Secretary's administrative practice indicates

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in the record, since we had failed to authenticate it; when we subsequently provided such authentication, the court, following the decision in *Dallas County v. Commercial Union Assurance Co.,* 286 F.2d 388 (5th Cir. 1961), admitted the account into evidence, by order dated April 1, 1977. App. I, 9.

17. According to the United States, the only reported case where the Secretary did not comply with state filing procedures was *Turner v. Kings River Cons. Dist.,* 360 F.2d 184 (9th Cir. 1966). U.S. Br. 56. However, as noted above, California law did not require the Secretary to comply with state filing procedures in that case. See note 2, *supra.*

that, at least until recently,[18] he took the historic position that section 8 *required* him to *fully* comply with state law. Pet. Br. 36-40. For instance, his present regulations, issued in 1959, provide that "project plans must comply with State

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18. In arguing that its position is supported by the Secretary's administrative practice, the United States cites only a statement from a treatise which declares that the "comity" argument reflects the "*present* position" of the United States. U.S. Br. 138. (Emphasis added.) Since the treatise was written in 1967, it shows only that the "comity" argument is of recent vintage.

Further, the statement in the treatise is not even consistent with a recent statement of the Commissioner of Reclamation to a congressional committee, to the effect that, "going back to the basic Reclamation Act of 1902, we are required to obtain water rights pursuant to State law, and we do." "Missouri River Basin Industrial Water Marketing," Hearing before the Subcommittee on Energy Research and Water Resources of the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st Sess., Pt. 1, at 54 (1975). Responding to a question from Senator Abourezk, the Commissioner's representative advised the committee that the United States brought the present action to determine whether the conditions of Decision 1422 are "consistent with the authorization that was made by Congress," *id.* at 56, 57, which is, of course, the test that we urge to be applicable under § 8. The Commissioner's representative further stated:

> "If a future State Governor would attempt to use waters which the Congress had allocated for irrigation to another use, the Bureau and the Department are placed in a situation in which we don't know which way to go. . . . This is the reason that we asked for clarification from the courts." *Id.* at 57.

Thus, the Commissioner's representative told the committee that the issue in this case is whether a state can impose conditions contrary to project purposes, which is not the issue in the case. By telling the committee that the Secretary is "required to obtain water rights under state law," he failed to reveal that the United States takes the opposite position in this case. The United States thus seeks powers from this Court which it has failed to obtain from Congress, and has failed to inform Congress of its intention to do so.

Finally, the United States notes that the Commissioner stated in 1975 that, although "each state has the duty to determine under its own statutes how its unappropriated water is to be used," the states cannot "dictate daily operations" of projects or "dictate future changes in authorized uses." U.S. Br. 139; Pet. Br. 39-40. This statement suggests that the states can impose conditions under *some* circumstances, and thus is not consistent with either the United States' "comity" or "form" arguments.

legal provisions or priorities for beneficial use of water," that the Bureau must comply with "the interests and rights of the States in the utilization and control of their water resources," and thus that "it is necessary to reach an understanding with the States regarding reservoir operating limitations." Pet. Br. 39; App. No. 2, pp. 9a-11a (attached hereto). Contemporaneously with the passage of section 8, he noted that "in some of the States radical changes in the laws must be made before important projects can be undertaken." Pet. Br. 37. Shortly after the section's passage, the U. S. Attorney General rendered a formal opinion, stating that the Secretary is without authority to reserve unappropriated water without complying with state laws relating to the "beneficial use" of water; he stated that section 8 followed the tradition of state control that had been recognized by Congress in the acts of 1866, 1870 and 1877.[19] Thus, con-

19. According to the opinion:

"The practical question thus presented is, whether the United States, by the exercise of executive authority, has the right to control the use of unappropriated waters passing through the public lands in a State, so as to prevent their appropriation by others for any of the beneficial uses recognized and allowed by the statutes of the State.

• • •

"In all the arid land States the common law rule as to the right of a riparian proprietor to the continued flow of a stream over his land has been changed, and rights to the use of water for manufacturing, mining, agricultural and other beneficial purposes have accrued and vested, under local customs, the laws of the States and the decisions of the courts. . . . The laws of the State provide that the use of such water may be acquired by appropriation, and as between appropriations the first in time shall be first in right.

• • •

"These acts [the acts of 1866, 1870 and 1877] evince a clear and definite purpose to authorize and assent to the appropriation of water upon the public lands in contravention of the common law —as to continuous flow."

• • •

"Section 8 of the reclamation act is an emphatic declaration that such laws [the acts of 1866, 1870 and 1877] are to continue in force.

temporaneously with the passage of section 8, federal officials construed the section as providing for state regulatory control of water. As the United States notes in its brief in another case pending before this Court, in which the United States argues for a continuation of the tradition of state control of water in interpreting the federal mining laws:

> "[E]ven if the statutory scheme were not clear on its face, the 'great deference' due to the statutory interpretations adopted by the officers charged with administering the lands laws [citations omitted] should preclude judicial interpretation of the statute at this late date to find water to be a locatable mineral. This deference is especially appropriate where the administrative practice at stake '"involves a contemporaneous construction of a statute by the men charged with responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."' [Citations omitted.]" Brief for the Petitioner, 30-31, *Andrus v. Charlestone Stone Products, Inc.*, No. 77-380.[20]

. . . A withdrawal of waters from appropriation under the State and Territorial laws would be in direct conflict with the provisions of said section.

"I have therefore to advise that there is no authority to make an executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, or will in any manner interfere with its laws relating to the control, appropriation, use, or distribution of water." 32 I.D. 254, 255, 256, 258 (1903). (Emphasis added.)

20. The United States also notes that the Reclamation Service stated in 1904 that, although the Secretary must fully comply with state law under § 8, he need do so only "so far as it is possible under the operations of the reclamation act," and may not be required to do so if "the state laws may be such that it is impossible to comply with them in conducting operations under the reclamation act." U.S. Br. 141 n. 107. These statements, of course, support our view that the Secretary is not bound by state laws which impair project purposes, and fail to support the United States' "comity" and "form" arguments.

III. CONGRESS HAS ESTABLISHED SPECIFIC, SUBSTANTIVE RECLAMATION POLICIES THAT LIMIT THE PRINCIPLE OF STATE CONTROL, BUT THE PRINCIPLE OF STATE CONTROL REMAINS VALID TO THE EXTENT NOT IN CONFLICT WITH SUCH SPECIFIC POLICIES.

The United States argues that provisions of the Reclamation Act of 1902, and of supplementary legislation later enacted by Congress, provide federal officials with broad, discretionary authority to carry out the policies of Congress' reclamation laws, and that this authority "leaves no room" for state control. U.S. Br. 86. The United States' argument is essentially that, if section 8 might otherwise be construed to provide for broad state control of water, the section is inferentially overridden by other provisions of the Reclamation Act of 1902, or has been inferentially repealed by Congress in subsequent acts. As we shall see, the substantive reclamation policies enacted by Congress in its supplementary laws limit the principle of state control in section 8, but nonetheless leave ample room for the applicability of a wide range of state laws that are not in conflict with these substantive reclamation policies.

A. Sections 2, 6, 7 and 10 of the Reclamation Act of 1902.

The United States argues that various provisions of the Reclamation Act of 1902, specifically sections 2, 6, 7 and 10, provide the Secretary with broad operational authority to carry out the provisions of the act, and thus free him from his obligation to comply with state law under section 8. U.S. Br. 91.[21] However, these statutory provisions have no

21. Section 2 authorizes the Secretary to make examinations and surveys for reclamation projects. 32 Stat. 388 (1902). Section 6 authorizes him to manage and operate the projects. *Id.* at 389. Section 7 authorizes him to acquire private water rights by purchase or condemnation. *Id.* at 389-390. Section 10 authorizes him to adopt rules and regulations to carry out the act's provisions. *Id.* at 390.

relevance to unappropriated water, or to how the Secretary acquires his rights to such water. Thus, the sections do not conflict with the directive in section 8 that provides for state control of unappropriated water. The United States essentially argues that other provisions of the 1902 act override section 8, and render it meaningless. Its argument is inconsistent with the rule of statutory construction that "a statute should be construed so that effect is given to all its provisions, and so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 2A Sutherland, *Statutory Construction* 63 (4th ed. 1973). See *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973).

B. Supplementary Reclamation Laws.

Relying on the analysis of Professor Sax, the United States argues that supplementary reclamation laws and policies, enacted in 1911, 1914, 1920 and 1939, vest the Secretary with broad discretion to carry out the purposes of Congress' reclamation laws; accordingly, the United States argues, Congress has "occupied the field" with respect to water allocation and use, and has left no room for state control. U.S. Br. 89. There can be no question that these supplementary laws establish a broad network of specific, substantive congressional policies that cannot be contravened by the states, and thus that diminish the authority of the states under section 8. Pet. Br. 58-60. However, none of these supplementary laws expressly repeals the principle of state control in section 8, nor does the United States argue otherwise. Thus, it is clear that, if a state law does not conflict with a specific congressional policy set forth in the supplementary laws, the state law is applicable to the Secretary under section 8.

The United States does not argue that state law in this case conflicts with a specific congressional policy set forth in the supplementary laws. Rather, it argues that the supplementary laws, in totality, vest federal officials with absolute, exclusive discretion over the use of water, thus enabling them to override state water laws whenever they choose to do so. The Court should be under no illusion as to the effect of this argument. Under this argument, section 8 would have no practical meaning or effect whatsoever. A major, fundamental policy of federal reclamation law, the provision of state control in section 8, would have repealed by implication. However, this Court does not favor repeals by implication. *Morton v. Mancari*, 417 U.S. 535, 549-551 (1974); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). As noted in *Radzanower:*

> "'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. [Citation omitted.] The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of the subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the earlier act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.'" 426 U.S. at 153.[22]

22. The United States also notes that § 102(b) of the Federal Water Pollution Control Act, 86 Stat. 816, 33 U.S.C. (Supp. V) §§ 1251 *et seq.*, as amended Pub.L. 95-217, 91 Stat. 1567 (1977), provides that federal agencies must "consider" the inclusion of storage for the purpose of regulating streamflow, and argues that this provision does not enable the states to regulate such streamflow. U.S. Br. 99-100. However, § 313 of the act, as amended in 1977 to overcome this Court's decision in *EPA v. California*, 426 U.S. 200 (1976), expressly requires federal agencies to fully comply with state permit procedures relating to water quality matters. Thus, § 102(b) requires federal agencies to "consider" water quality matters, and § 313 subjects their considerations to state control. Section 313 is thus another example of a federal law, such as § 8, which subjects a federal agency's discretionary review to state law.

Closer analysis of the supplementary laws reveals that Congress, far from inferentially repealing the principle of state control in section 8, consistently reaffirmed that principle. The Warren Act of 1911, 36 Stat. 925, 43 U.S.C. §§ 523 *et seq.*, provides for the sale of surplus water, when a project impounds more water than is needed for irrigation purposes. Congress inserted a provision in the act providing that "nothing contained in this Act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State." 36 Stat. 926, 43 U.S.C. § 524. This provision was inserted, it was explained, "to allay and set aside any suspicion that anyone might entertain that the Government has the right to the water." 46 Cong. Rec. 2783, 61st Cong., 3d Sess. (1911) (Rep. Reeder). The Senate and House reports, in explaining the provision, quoted from a report submitted by the Secretary of the Interior, as follows:

> "'Section 8 of the reclamation act provides, among other things, in effect that the use and distribution of water appropriated and impounded by the Secretary of the Interior under said act shall conform with the state laws, and Congress could not otherwise provide, for the reason, as stated by Mr. Justice Brewer, in Kansas v. Colorado (206 U.S. 46, 92), "We do not mean that its legislation can override state laws in respect to the general subject of reclamation."'" S. Rep. No. 442, 61st Cong., 3d Sess. 3 (1910); H.R. Rep. No. 2002, 61st Cong., 3d Sess. 3 (1911).

The Reclamation Extension Act of 1914, 38 Stat. 686, enlarges the time within which construction charges can be repaid to the reclamation fund by users of project water. In the congressional debates, it was explained that this act would not impair the provision of state control in section 8:

> "[U]nder the reclamation law the Secretary of the Interior applies for a water right for these lands under the State law just as a private appropriator does, in accordance with the State statute. These people do not differ in their rights at all from their neighbors, who also use water. The only difference is that they are dealing with the Secretary of the Interior, where the others are dealing with private parties or cooperative associations." 51 Cong. Rec. 12954, 63d Cong., 2d Sess. (1914) (Rep. Mondell).

The Act of February 25, 1920, 41 Stat. 451, 43 U.S.C. § 521, expanded the coverage of the Reclamation Act of 1902 to include non-irrigation purposes. This act also expanded the coverage of section 8 to include such non-irrigation purposes. See note 9, *supra*. According to the act's legislative history:

> "[The Secretary] has no authority except as we give him authority as an agent to do what any other agent could do *under the State law;* and we provide here that, acting as the agent or the trustee of these people, he may, of the water diverted *under the State law,* provide for its use for certain purposes incidental to irrigation." 59 Cong. Rec. 2981, 66th Cong., 2d Sess. (1920) (Rep. Mondell). (Emphasis added.)

Finally, the Reclamation Project Act of 1939, 53 Stat. 1187, provided for payment of construction charges on federal reclamation projects. The act was amended in 1956 to include a provision identical to section 8. 70 Stat. 484, 43 U.S.C. § 485h-4. The amendment was necessary, it was

explained, "to avoid any possibility that this bill might be construed to depart from the basic policy of section 8 of the Reclamation Act of 1902 . . . ." S. Rep. No. 2241, 84th Cong., 2d Sess. 5 (1956); H.R. Rep. No. 1754, 84th Cong., 2d Sess. 5 (1956).

Thus, these acts reveal that, rather than abandoning the fundamental policy of section 8, Congress has consistently reaffirmed that policy.[23]

The United States, although relying on Professor Sax's analysis of the supplementary laws, fails to mention Sax's conclusion that, where the supplementary laws do not conflict with state law, the state law is valid. Indeed, Sax's thesis is not that the supplementary laws have destroyed the concept of state control in section 8; rather, it is that the supplementary laws reject the notion that the states have a veto power over the projects, and thus can override what Congress has done. According to Sax:

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23. Similarly, Congress reaffirmed that policy in enacting the McCarran Amendment, 43 U.S.C. § 666(a), which subjects the United States' water rights to adjudication by state courts. The Senate report, after tracing the development of the appropriation doctrine in the western states, concluded:

> ". . . Congress was most careful not to upset, in any way, the irrigation and water laws of the Western States. In 1902 Congress wrote into the Federal Reclamation Act a strict admonition to the Secretary of the Interior . . . [in] Section 8. . . .
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> "In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof. . . .
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> • • •
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> "Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951).

"Certainly the first step must be to stop thinking that effectuation of congressional intent requires us to read section 8 literally; we must, for a variety of reasons, begin to view the purpose of section 8 in a somewhat more sophisticated manner. First, as we have already seen, even in 1902 it was clear that Congress did not mean section 8 to be read literally, but rather intended it to be read as *requiring federal deference to state law only insofar as state law was not inconsistent with federal policies.* Thus, now as then, section 8 must be read not as permitting a state veto power, but merely as an invitation to the states to act where Congress has done nothing.

"Of course the easy problems have already been solved, and properly, by the Court. Where there is a "specific and mandatory" federal rule in the law, it must be observed even when in derogation of state law. But all the really difficult problems lie ahead, for as we have now seen, the reclamation laws are full of federal policies of varying specificity, of varying importance and of varying clarity. . . .

"These and like questions present the ultimate difficulty for problems of federalism because there is no readily ascertainable solution for them. To find an answer we must look to the rather indefinite "policy" of the law for guidance. But to the policy of state law, or of federal law? That is the question, for we will frequently get different results if we look at one source rather than the other.

"The dilemma is presented by traditional congressional unwillingness to face up to the problem. It has never openly repudiated state law as the principal source for administration of reclamation projects, yet, as we have seen, it has made clear its desire to utilize the reclamation laws to implement all sorts of diverse federal policies.

"But while Congress has been unwilling to meet the problem directly, it has made the answer apparent

enough through its actions. It is as simple as asking whether we can permit the congressional desire to administer projects such as Fry.-Ark. in conformity with federal farm policy to be ignored? Or whether the congressional interest in recreation could be vitiated by a state legislature subject to pressures from mining or farm lobbies? Or whether the Secretary, entrusted by Congress to decide whether an application for surplus water will interfere with irrigation, must have state officials decide that question for him?

"Certainly Congress has made plain enough that it wants these national policies implemented. . . . The Secretary must look to *federal* law—to the statutes, to the legislative history and to the total fabric of national concerns and interests in administering federal reclamation projects. . . .

"This, of course, does not mean that state law will have no place; where it is not incompatible with the federal policy state law may be resorted to. . . .

"Nor, finally, ought this view to be rejected as novel and unprecedented. By now some readers will have recognized that the theory proposed here is little more than an application to federal reclamation law of the principle announced by the Supreme Court to govern the law of collective bargaining contracts. Indeed, the language used by the Court in the *Lincoln Mills* case is so appropriate to this situation that it may be paraphrased here as perfectly stating the proposed rule for reclamation projects:

> We conclude that the substantive law to apply in [administering federal projects] is federal law, which the [Secretary] must fashion from the policy of our national [reclamation] laws. . . . The [Reclamation Act] expressly furnishes some substantive law. It points out what . . . may or may not [be done] in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will

be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of [the Secretary's] inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . *But state law, if compatible with the purpose of* [*the Act*], [*should*] *be resorted to in order to find the rule that will best effectuate the federal policy.*" Sax, "Problems of Federalism in Reclamation Law," 37 *Univ. of Colo. L. Rev.* 49, 79, 81-84 (1964). (Emphasis added; footnotes omitted.)

C. Pre-Authorization Planning Procedures.

The United States points out that the federal reclamation laws provide planning procedures that must be followed by federal officials prior to congressional authorization of the project. U.S. Br. 104. It notes that these procedures authorize the states to participate in the formulation of a federal project, and thus provide the state with a voice in the authorization process. *Ibid.* It argues that these procedures would be "pointless" if a state were authorized to subsequently impose conditions on the federal water right, after the project has been authorized. *Ibid.*

There is no question that the states have an opportunity to help shape the contours of a federal project during the authorization process, and that, once the project receives its final shape from Congress, the state cannot re-shape the project. Thus, the issue in this case is not whether the states can change a regulatory scheme established by Congress, such as by negating the congressionally-mandated purposes of the project or rendering the project economically infeasible; both sides agree that the states lack such authority. Rather, the issue is whether the states have authority to develop a scheme for the acquisition and use of water that complements, and does not conflict with, the congressional scheme. It is whether the states have any authority to fill in the details of the congressional scheme, to the extent that such details were not specifically determined in the authorization process.

The United States, in arguing that our view would render the planning procedures "pointless," assumes that the authorizing act provides a definitive reclamation scheme that leaves no room for administrative adjustment by the states. Its assumption does not accord with reality. In authorizing a project, Congress typically sets forth only a general reclamation scheme; it typically describes the basic purposes of the project, the amount of water to be impounded, and so forth. But the passage of the authorizing act gives rise to a host of problems and concerns involving water allocations, many of which may not have been considered or foreseen in the authorizing act. These problems and concerns are typically local, not national, in nature. For example, is the public interest better served by providing for economic development of one agricultural area rather than another, or for development of one municipality rather than another? How can the acquisition and use of project water be fully coordinated with the acquisition and use of water by non-federal projects?[24]

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24. For instance, in Decision 1379, the State Board has imposed conditions in permits issued to the Bureau and the California Department of Water Resources, the operator of California's State Water Project; the conditions provide for the coordinated release of water from both federal and state projects in California, in sufficient amounts to prevent salinity intrusion in the Sacramento-San Joaquin Delta. The Delta is a complex, delicate eco-system that functions as a "pool" where most waters from federal and state projects in California are received, and from which waters are exported by pumping facilities to customers of both federal and state projects. Decision 1379 was the product of hearings that lasted for several years, and in which the Bureau was an active

What kind of conservation measures, if any, should be imposed on farmers receiving project water, to insure the most beneficial use of water? See Amicus Curiae Brief of Charles J. Meyers, 13-14.

Indeed, this case presents an example of how a state has responded to problems, primarily local in nature, that were not foreseen in the authorizing act. Congress authorized the New Melones Project to provide water for the East Side Division, a proposed addition to the Central Valley Project. Pet. Br. 8. The project was not authorized in isolation; rather, it was authorized "as a part of the plan of development for the proposed East Side Division." H.R. Doc. No. 453, 87th Cong., 2d Sess. 83 (1962). The benefit-cost analysis, as well as the analysis of irrigation and power benefits, was based on the assumption that water would be used in the East Side Division. *Ibid.* However, Congress has apparently abandoned its plans to proceed with construction of the East Side Division, and the congressional plan for water use cannot be fulfilled. Thus, the Bureau is proceeding with a different "project" from that considered and authorized by Congress. Moreover, the Bureau has failed, to this point, to develop an

participant. See generally Note. "The Delta Water Rights Decision," 2 *Ecology L. Quar.* 733 (1973).

Amicus Friant Water Users Ass'n, *et. al.* (hereinafter "Amicus Friant"), argues that the conditions of Decision 1379 are inconsistent with the purposes of federal projects in California. Amicus Friant Br. 26-30. It notes that it has brought a mandamus action, under California law, to review the validity of the conditions. *Ibid.* California's position in that action is that the conditions are harmonious with the purposes of the federal projects, and are protective of the beneficial use of water. The effect of the conditions upon project purposes can only be examined in the mandamus action, not here. Suffice it to say that, if the lower decision is sustained, California will have no opportunity in the mandamus action to present its view that the conditions are consistent with project purposes.

alternative plan for water use for its "project."[25] Congress failed to foresee, or provide for, these unusual circumstances in its authorizing act. The State Board, applying traditional principles of western water law, found that the Bureau had failed to develop a plan, and thus had failed to meet the "beneficial use" test; it deferred the Bureau's rights until the Bureau develops a plan and meets the test. Thus, the State Board's decision complements, and does not conflict with, the congressional scheme found in the authorizing act. Far from rendering the planning procedures "pointless," the decision bridges a gap that the planning procedures overlooked.

Since Congress cannot usually foresee the broad range of problems that may arise from its authorizing acts, it usually does not provide an answer to all these problems. To the extent that a congressional answer is not provided, it is difficult to perceive any national interest that prevents a state from entering the arena, assuming that its entry does not have the effect of negating the project purposes. Since these problems are usually local in nature, they usually

25. Amicus Friant argues that California's permit system enables California to obtain "full knowledge" of the Bureau's proposed water uses. Amicus Friant Br. 23-26. However, Amicus Friant fails to explain how California can obtain this information if, as argued by the United States, the Bureau need not comply with California's permit system. Moreover, the Bureau, in its permit applications in this case, provided only a general project description containing the same information already found in the authorizing act, and did not provide a concrete plan for water use; its applications merely state that water will be used for "irrigation" and other purposes, but do not specify where, or in what specific amounts, such water will be used. App. II, 63. More importantly, the broader issue in this case is whether the state has the right to determine the most beneficial use of water, not whether the Bureau must merely submit a plan to the state. The state's right to obtain information relating to the Bureau's proposed water uses does not afford the state an opportunity to determine the most beneficial use of water, as contemplated by § 8.

have little effect on any discernible national interest. Conversely, they have a vital impact on state interests. In the water-scarce western states, the use of project water by one group of farmers rather than another, or by one municipality rather than another, usually establishes the pattern of economic growth and development of each state. Thus, the states have an interest in insuring that project water, similarly to other waters, are put to their most beneficial use, as determined by the state. This is the primary reason why Congress, in enacting section 8, entrusted this function to the states. If the result were otherwise, California and other western states would lack authority to solve a wide range of water allocation problems, no matter how much the problems may affect local rather than national interests.[26]

26. The United States points out that the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. §§ 4321 *et seq.*, requires the preparation of an environmental impact statement (EIS) with respect to certain actions of federal agencies; it argues that NEPA enables Congress and the Secretary to learn, prior to congressional authorization of a project, of potentially adverse environmental effects of the project. U.S. Br. 100. However, NEPA's sister act, the National Environmental Quality Act of 1970, 84 Stat. 114, 42 U.S.C. §§ 4371 *et seq.*, provides that "there is a national policy for the environment which provides for the enhancement of environmental quality," and that "the primary responsibility for implementing this policy rests with State and local governments." *Id.*, at § 4371(b). Further, NEPA merely provides a method for analysis of a proposed action, and thus serves as one form of information which Congress and the Secretary may consider in determining, prior to project authorization, whether to proceed with construction of the project; it does not necessarily provide them with information sufficient to either anticipate or to determine the wide range of water allocation problems, many of which are local in nature, which might arise after the project is authorized. For instance, the EIS prepared for the New Melones Project fails to consider the effect of Congress' apparent abandonment of the East Side Division, and the Secretary's unilateral decision to utilize the yield of New Melones in other locations. See Environmental Impact Statement, New Melones Lake, Stanislaus River, California (U.S. Army Engineer District, Sacramento, Cal., May 1972). Some of the possible consequences of the Secretary's decision were analyzed in a supplemental EIS, but even that document declared that "[u]ntil the decision of the State Water Resources Control Board is rendered, and water service contracts have been executed, the environmental impact of the use of the new conservation yield and related aspects of the project cannot be specifically evaluated." Supplemental EIS, New Melones Lake, Stanislaus River, California, B-3 (Bureau of Reclamation, 1973).

D. Unitary Federal Control v. Tradition of State Control.

The United States argues that our view is "unworkable," because the efficient operation of a federal reclamation project depends on unitary federal control. U.S. Br. 112. In fact, our view is that which has been followed in actual, historical practice. The Secretary has *always* complied with state regulatory water law under the Reclamation Act of 1902. Pet. Br. 36-40; see page 32, *supra*. In California, for example, he has acquired appropriative permits from the State since 1927, and has consistently complied with conditions in the permits. *Ibid.;* App. II, 2. Thus, the Secretary has historically complied *fully* with state law, not just with the "forms" of state law. He now seeks to change that historical practice, arguing that the historical practice is "unworkable." To argue, at this late date, that the historical practice is "unworkable" is to suggest that the entire federal reclamation program has been, since its inception, an historical failure. It is to defy Justice Holmes' admonition that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921).

Indeed, we question the workability of the view urged by the United States. Under that view, the Secretary would have exclusive, discretionary authority to control water uses, and thus to override state water laws whenever he chooses to do so. Thus, he would be setting social policy in the western states, determining which economic and

municipal groups receive water and which do not. Moreover, since the Secretary has not traditionally controlled water rights, he has failed to develop a mechanism, in the form of structured administrative proceedings that are subject to judicial review, that enable him to discover the many factors that are relevant to the public interest. Thus, he would be setting social policy in a regulatory vacuum, largely free of controls other than those imposed directly by Congress; indeed, the concept of discretion presumes a measure of freedom from regulatory control. This result invites the possibility, as suggested by Justice Douglas, that a farmer "can receive his priority because he is the most worthy Democrat or Republican as the case may be." *Arizona v. California,* 373 U.S. 546, 630 (1963) (Douglas, J., dissenting). Conversely, the western states, which have traditionally controlled water rights, have developed elaborate administrative machinery that enables them to examine all factors relevant to the public interest, and have provided for judicial review of the administrative process. Hence, the western states, unlike the Secretary, have developed a mechanism that is uniquely designed to provide for the most beneficial use of water. A system that requires the Bureau to participate in administrative proceedings intended to discover the most beneficial use of water, and that are subject to judicial review, is eminently more sound and workable than one that effectively allows the Secretary to operate in a regulatory vacuum.

The United States' argument, that the federal projects can be efficiently operated under only unified federal control, was the same argument that was considered, and rejected, by Congress in 1902. Congress evidently believed that the interest of unified control was outweighed by the interest of continuing and extending the tradition of state

control of water, a tradition recognized and approved by Congress in the acts of 1866, 1870 and 1877. Pet. Br. 32-33. Indeed, it would be anomalous to exempt the distribution of water under the 1902 act from state water laws, since such water is distributed to the same local economic interests that, under the acts of 1866, 1870 and 1877, are otherwise subject to such state laws. Thus, Congress weighed competing, disparate interests in enacting section 8; it reached a result that it believed accommodated both national and local interests within the delicate framework of our federal system. The United States seeks to have this Court reweigh these interests, and overturn the accommodation carefully worked out by Congress.

IV. ASSUMING ARGUENDO THAT THE UNITED STATES IS NOT BARRED FROM COLLATERALLY ATTACKING THE VALIDITY OF THE CONDITIONS OF DECISION 1422, THE CONDITIONS ARE FULLY CONSISTENT WITH THE SPECIFIC PURPOSES OF THE NEW MELONES PROJECT.

The United States argues that the conditions of Decision 1422 "exemplify the unworkability" of our view. U.S. Br. 57. As noted later, the United States is precluded from collaterally attacking the validity of the conditions, if the State Board had general jurisdiction to impose conditions. See page 61, *infra*. However, the United States argues that the conditions themselves demonstrate the "unworkability" of our view, and thus show that the State Board lacked such general jurisdiction.

If the United States' argument is upheld, it will have succeeded in nullifying the states' authority to impose *any* conditions under section 8, on grounds that the conditions in this case are, under its argument, unduly broad. Under that result, California and other western states would have

no opportunity to show that state-imposed conditions in other, or future, cases are fully harmonious with the purposes of the federal projects in question.[27] Even if the United States is correct in arguing that the conditions of Decision 1422 are unduly broad, that fact does not justify the United States' conclusion that the states are without authority to impose conditions under *any* circumstances.

Moreover, closer scrutiny of the conditions of Decision 1422 reveals that, if the doctrines of res judicata and collateral estoppel do not foreclose consideration of the question, the conditions are not inconsistent with the purposes of the New Melones Project, and are not unworkable. The basic objective of the project, as noted above, is to serve eight specified purposes,[28] and to be operated in a way that

27. Thus, the United States would have succeeded in its strategy to focus this Court's attention solely on Decision 1422 in resolving the meaning of § 8, rather than on two other decisions—Decisions 1379 and 1400—where the State Board has imposed different conditions on water uses of different reclamation projects. In fact, Decision 1379 is a landmark administrative decision that has much greater statewide significance than Decision 1422, and was issued prior to Decision 1422; thus, Decision 1379 logically would have merited judicial attention before Decision 1422. Prior to the filing of this action, California brought an action against the United States to resolve the validity of the conditions of Decision 1379, as well as the conditions of Decision 1400 and 1422. See *State of California v. Morton*, No. S-2924 (E.D. Cal.). However, the district court granted the United States' motion to stay further proceedings on the State-filed action, so that the present action could go forth. Thus, the United States has successfully focused this Court's attention solely on the conditions of Decision 1422, and now argues that the "unworkability" of the conditions stigmatizes *all* state-imposed conditions, apparently including those contained in Decisions 1379 and 1400. Our view, as we argued in opposing the United States' motion to stay further proceedings on the State-filed action, is that the validity of conditions in other cases must be examined on the basis of the facts in those cases, not here.

28. The purposes are flood control, agricultural use, municipal use, industrial use, fish and wildlife protection, water quality control, power and recreation. Pet. Br. 3-4.

is economically feasible; further, its objective is to provide agricultural and power benefits, as well as other consumptive use benefits, to the East Side Division. Pet. Br. 8 n. 11; see page 46, *supra*. The United States does not argue that the conditions of Decision 1422 prevent the flow of such benefits to the East Side Division; it cannot make that argument, since Congress has apparently abandoned plans to build the East Side Division. The United States does not argue that the conditions prevent the Secretary from using water for specific consumptive purposes in a specific area or areas; it cannot make that argument, since the Secretary has failed to develop a plan to use such water. Instead, it argues that the conditions, in deferring full impoundment, may make the project economically infeasible. U.S. Br. 64-65. However, the State Board's decision to defer full impoundment is based on the Secretary's failure to develop a plan for water use; thus, it is the Secretary's failure to develop a plan, not the conditions which defer full impoundment until he develops a plan, that threatens to defer realization of the full benefits of the project, and thus defer the economic feasibility of the project. The United States seeks to make the State Board the scapegoat for the Secretary's failure to act, and then argues that, since the State Board is the scapegoat, the states have no business in the field of reclamation. The United States was more accurate when the Army Corps of Engineers advised the Council of Environmental Quality that "the board, in its decision, has manifested its awareness of the dynamic nature of these [project] needs." Pet. Br. 10 n. 12. The United States was more candid when it advised this Court in another case that the decision does not "fundamentally alter" the value of the project, *id.* at 10, a concession which it recants now that

the concession proves embarrassing to its position in this case. U.S. Br. 67 n. 43.[29]

Further, the United States argues that, since the conditions allow the State Board to "weigh" the "benefits" and "damage" of the Secretary's future water plan, the conditions *may* enable the State Board, in the *future*, to determine "whether the purpose for which Congress had authorized" the project "would be allowed to go forward." U.S. Br. 66. We concede, however, that the State Board cannot

29. The United States also argues that the State Board denied full power benefits for the project, even though it found that there was a "beneficial use" of water for power purposes. U.S. Br. 64. In fact, the State Board followed congressional policy relating to power purposes of federal reclamation projects. As was explained by the floor manager for the Conference Committee in 1939, in explaining the bill that became the Reclamation Project Act:

> "Power is subsidiary to reclamation. It is only available where the storage dam raises the water to a sufficient level." 84 Cong. Rec. 10220, 76th Cong., 1st Sess. (1939).

Thus, Congress does not intend for federal reclamation projects to store water *solely* for power purposes. Rather, it intends that water can be used for power, to the extent that it is stored for *other* purposes. This same scheme was followed in the act authorizing the New Melones Project. H.R. Doc. No. 453, 87th Cong., 2d Sess. 50, 51, 52 (1962). The State Board followed this congressional scheme, by allowing water to be used for power to the extent that it is impounded for other (fish and wildlife protection, water quality control) purposes. App. II, 33-34. It deferred the use of water for additional power until the Secretary is allowed to store additional water for other consumptive (agricultural, municipal, industrial) purposes. *Ibid.* The United States' argument that water should be impounded *solely* for power purposes is inconsistent with congressional policy. Moreover, it would result in a different project from that authorized by Congress, one that would be much less economically feasible. H.R. Doc. No. 453, 87th Cong., 2d Sess. 52 (1962).

Further, although the Secretary plans to build a power plant with a capacity of 300,000 kw., App. I, 16, the authorizing act provides for a power plant with a capacity of only 150,000 kw. H.R. Doc. No. 453, 87th Cong., 2d Sess. 17 (1962). Hence, it cannot be argued that a temporary reduction of power benefits as planned by the Secretary, is inconsistent with the authorizing act.

take action, now or in the future, that will prevent the project purposes from going forward. The Court cannot determine in this case whether the State Board will exceed that limitation, since that question can only be determined when the State Board takes its future action. See *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952); *Eccles v. Peoples Bank*, 333 U.S. 426 (1948); cf. *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968).[30]

Having failed to show that the existing conditions impair the specific purposes or value of the project, the United States falls back on lesser arguments. First, it argues that the conditions interfere with its broad operational authority under the act. U.S. Br. 84. In fact, it argues, the conditions are so broad that they enable the State Board to "unilaterally redesign the operations of the project." U.S. Br. 85. However, we attach an appendix to this brief that describes the effect of each condition analyzed by the United States. App. No. 1, pp. 1a-8a (attached hereto). As this appendix shows, the United States has exaggerated the effect of the conditions. Except for the conditions limiting full impoundment, the conditions impose only minor obligations on the Secretary, and do not substantially alter the

30. The United States also argues that several other conditions, in reserving jurisdiction to the State Board to adopt future conditions on the basis of new information, enable the State Board to adopt conditions that may frustrate the purposes of the project. U.S. Br. 75-78. For instance, it argues that the State Board may adopt a future condition requiring all project water to be used for water quality control purposes. *Id.* at 77. We do not assert the right, of course, to adopt conditions, now or in the future, that negate project purposes, or render the project economically infeasible. Certainly a condition requiring all project water to be used for non-consumptive, water quality control purposes would render the project economically infeasible, and thus beyond the State Board's authority under § 8. However, the Court cannot determine in this case whether future conditions will exceed the State Board's authority under § 8, since that determination can only be made when, and if, such future conditions are adopted.

way that he plans to operate the project, much less alter any congressionally-authorized project purpose. As for the impoundment conditions, these conditions substantially alter the way that the Secretary plans to operate the project, in that the Secretary apparently intends to fully impound project waters before developing a plan for their use; however, as noted above, the conditions are eminently consistent with Congress' overall objectives for the project.

More importantly, the United States appears to suggest that, since the Secretary is authorized to "operate" the project, any condition that affects his operational authority is invalid. However, section 8 presupposes that state law will have an effect on the Secretary's operational authority, in the sense that he must distribute water consistently with state laws relating to the "beneficial use" of water; the language of section 8, in requiring the Secretary to "proceed in conformity with" such state laws, necessarily fixes an obligation on the Secretary that limits his operational authority. If the result were otherwise, the Secretary's operational authority would enable him to override state laws whenever he chooses, and thus nullify the fundamental reclamation policy contained in section 8. In fact, the Secretary's basic authority to "operate" the projects is found in section 6 of the Reclamation Act of 1902, 32 Stat. 389, and no member of Congress, in 1902, was disingenuous enough to suggest that this provision nullified the effect of section 8. Therefore, the proper inquiry is not whether the state law affects the way in which the Secretary "operates" the project, for section 8 inevitably has that effect. Rather, the proper inquiry is whether the state law is within the authority of the state under section 8, in that it is confined to protecting the "beneficial use" of

water and does not negate the basic purposes of the project or render it infeasible.

More generally, the United States argues that the authorizing act sets forth a congressional reclamation scheme of such "comprehensiveness and detail" as to leave no room for state control. U.S. Br. 86. This comprehensive scheme is found, it is argued, in the provisions requiring that the project be "initiated" as expeditiously as possible, requiring that the project be operated as an "integral part" of the Central Valley Project, requiring the Secretary to "give consideration" to the inclusion of water quality benefits, providing that the project shall be "operated" by the Secretary, and so forth. *Id.* at 82-86. As an example of how broadly the United States interprets the congressional scheme, it argues that there is no room for even the most nominal, minor conditions in Decision 1422, such as the conditions that require the Secretary to provide reports to the State Board so that the Board can determine whether the conditions are being met. *Id.* at 80. Importantly, the United States does not argue that the conditions of Decision 1422 prevent the Secretary from performing his duties under the act. It does not contend that the conditions require him to perform an act that is forbidden by the authorizing act, or prohibit him from performing an act that is mandated by the authorizing act. Rather, it argues that the congressional scheme fills every nook of the reclamation house, thus leaving no room for the states.

The United States' argument poses, perhaps, the ultimate question in this case, the answer to which will determine whether section 8 remains a viable principle of reclamation law. That is, does Congress, in authorizing a reclamation project, develop a comprehensive scheme that vests absolute discretion in the Secretary, thus leaving no

room for the applicability of state regulatory laws? Or, instead, is there room for the applicability of state regulatory laws in the congressional scheme, if the state laws do not contradict the *specific* purposes of the scheme? These questions are analogous to those which arise under the doctrine of preemption. Under that doctrine, the courts are called on to determine whether Congress, in passing a particular act, meant to "occupy the field" and thus void any state laws relating to the same subject matter, or instead meant to sanction state laws that do not interfere with a specific, identifiable provision or policy of federal law. See, *e.g., New York State Dept. of Social Services v. Dublino,* 413 U.S. 405 (1973); *Goldstein v. California,* 412 U.S. 546 (1973). Here, the United States' view is analogous to the former facet of the preemption doctrine, and California's view is analogous to the latter.

Section 8 indicates that Congress did not mean to "occupy the field" with respect to water uses of individual projects, but instead meant to defer to state law. The section embodies a major, fundamental principle of federal reclamation law, one that has been consistently followed in historical practice. Congress presumptively means for that principle to retain its vitality, until it says otherwise. Thus, the principle should be read into congressional acts that authorize individual projects, except where *specific* elements of the congressional scheme make it impossible to apply the principle. If the result were otherwise, the ample congressional assurances of 1902 relating to state control of water, would be withdrawn *sub silentio* every time that Congress authorizes an individual project. Section 8 would thus become a testament to an empty principle, one that endures on paper but is ignored in practice, "full of sound and fury, signifying nothing." The section

would have been repealed, for practical purposes, by congressional silence and implication. The United States, in the final analysis, asks this Court to abrogate one of the fundamental, historical principles of basic reclamation law. If that principle is to be abrogated, such must be done by Congress, not this Court.

Thus, we opt for the view, as expressed by Professor Sax, that "state law, if compatible with the purposes of [the Act], [should] be resorted to in order to find the rule that will best effectuate the federal policy." See page 43, *supra.* As Dean Meyers states, "[T]he Court should perform the admittedly harder but intellectually more honest task of determining whether the Congressional purposes in authorizing the construction and operation of the New Melones Project are frustrated to the extent that, in this case, the Section 8 presumption in favor of state law has been rebutted." Amicus Curiae Brief of Charles J. Meyers, 12. Thus, the Court, following the preemption analogy, should determine whether the conditions interfere with the specific purposes of the project.

The United States argues, however, that this task is too "complex" to be undertaken by the courts. U.S. Br. 85. This is the argument commonly raised by those who assert that the courts are powerless to fairly balance federal and state interests, even where congressional policy can only be fulfilled by such a balancing approach. It is an argument that this Court has rejected in other contexts; for instance, in *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 456-457 (1957), the Court held that state policy, where not in conflict with *specific* federal policy, should be looked to in determining the rule that will best effectuate the federal policy relating to collective bargaining contracts.

Moreover, the inquiry which we suggest is not particularly difficult. As noted above, the United States has not

shown that the basic purposes and value of the project are frustrated by the conditions. See page 53, *supra*. Rather, it argues that the conditions conflict with the various provisions of the authorizing act that vest broad, discretionary authority in the Secretary. U.S. Br. 82-86. In fact, there is no such conflict. For example, there is no conflict between the congressional provision requiring that the project be "initiated" as expeditiously as possible, and the conditions that defer full impoundment until a water use plan is developed; if anything, the congressional provision requires the Secretary to expeditiously develop the plan which the State Board requires as the basis for full impoundment. There is no conflict between the congressional provision requiring that the Secretary "give consideration" to providing for water quality control, and the conditions that set proper levels for water quality control; the Secretary can fully comply with both obligations. There is no conflict between the congressional provision requiring that the project be operated as an "integral part" of the Central Valley Project, and the conditions that require a preference for water users in the Stanislaus River basin until the Secretary develops a plan for water use outside that basin; the Secretary can obtain the right to use water outside the basin as soon as he develops a plan for such use. There is no conflict between the congressional provision that provides that the project shall be "operated and maintained" by the Secretary, and the conditions that are designed to protect the "beneficial use" of water; as noted above, the Secretary can operate the project in conformity with the conditions.

Therefore, the Secretary's obligations under the authorizing act are fully compatible with his obligations under Decision 1422. He can fully comply with both sets of obligations. Thus, there is no conflict in this case between federal policy, as defined by Congress, and state policy. Rather, there is only a conflict between state policy and an administrative policy worked out by the federal executive branch, one that was not mandated or even considered by Congress. Section 8 clearly indicates that such conflicts must be resolved in favor of the state policy. If they are not, section 8 will have no practical effect. In that event, a fundamental principle of the federal reclamation laws will have been abrogated without a word from Congress.

V. THE DOCTRINE OF FINALITY OF JUDGMENTS BARS THE UNITED STATES FROM COLLATERALLY ATTACKING THE VALIDITY OF THE CONDITIONS OF DECISION 1422, IF THE STATE BOARD HAD GENERAL JURISDICTION TO IMPOSE CONDITIONS.

This Court need not examine the conditions of Decision 1422 to determine whether the conditions are consistent with the purposes of the New Melones Project. The doctrine of finality of judgments bars the United States from now challenging the validity of the conditions, and hence from arguing that the conditions are inconsistent with project purposes. The United States argues that this doctrine does not bar it from challenging the general jurisdiction of the State Board to impose conditions; it argues that, if the State Board lacks jurisdiction to impose conditions, the State Board cannot claim such jurisdiction because of the United States' failure to seek timely, direct judicial review of the conditions. U.S. Br. 144. We agree with this argument, but it is not responsive to our position.

Under California law, the doctrine of finality bars relitigation of a prior decision, if the decision was rendered by a court or agency of "competent jurisdiction." *Stockton v. Department of Employment*, 25 Cal.2d 264, 268 (1944);

De Celle v. City of Alameda, 221 Cal.App.2d 528, 538 (1963). The same rule applies in the federal courts. See *Commissioner v. Sunnen,* 333 U.S. 591, 597-598 (1949); *Southern Pac. R.R. Co. v. United States,* 168 U.S. 1, 48-49 (1897); *Tidewater Oil Co. v. Jackson,* 320 F.2d 157 (10th Cir.), *cert. denied* 375 U.S. 942 (1963); Restatement of the Law, *Judgments* § 7; Scott, "Collateral Estoppel by Judgment," 56 *Harv. L. Rev.* 1, 18-22 (1942); Note, "Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation," 46 *George Wash. L. Rev.* 65, 72-73 (1977); 1B Moore, *Federal Practice* 631-653. Thus, the doctrine does not bar re-litigation of a prior decision, if the court or agency in the prior case lacked general jurisdiction to issue the decision; rather, it bars re-litigation only to the extent that the court or agency in the prior case had such general jurisdiction. *Ibid.* Applied here, the doctrine does not bar the United States from challenging the general jurisdiction of the State Board to impose conditions on the Bureau's appropriative permits.[31] Rather, it bars the United States from challenging the validity of the conditions, *if* it is held

31. Even if the doctrine were construed as barring the United States from asserting that the State Board lacks general jurisdiction to impose the conditions of Decision 1422, the petitioners have not objected to the United States' assertion of that question, and waive any objection they might have.

Further, the United States' complaint for declaratory relief asks for a judicial declaration on the broad jurisdictional question whether, and to what extent, the Bureau is required to comply with California's permit system. App. I, 19. The validity of the conditions of Decision 1422 is merely illustrative of the general jurisdictional question. *Ibid.* There are other cases currently pending in California that raise the same jurisdictional question as that presented here. See notes 24, 27, *supra.* Further, it is anticipated that another such case, of major statewide significance, may arise in the future. Therefore, the complaint states a proper request for a judicial declaration on the jurisdictional question, whether or not that question can be examined in the context of Decision 1422.

that the State Board has general jurisdiction to impose such conditions. If the State Board lacks such general jurisdiction, the conditions have no legal effect. However, if the State Board has such general jurisdiction, the conditions cannot be collaterally attacked. Hence, the United States is barred from attacking the conditions, to the extent that the State Board has jurisdiction to impose conditions. The lower court did not, as stated by the United States, reject our analysis. See U.S. Br. 142. Rather, it agreed with our analysis, but held that the State Board lacked general jurisdiction to impose conditions. App. I, 90-92.

The United States argues that the State Board did not find that the conditions are consistent with project purposes. U.S. Br. 143.[32] This argument misses the mark in

32. The United States also argues that the "beneficial use" test, as found in § 8, is different from the "beneficial use" test provided in California law, and thus that the State Board applied a different standard than that provided in federal law. U.S. Br. 143 n. 108. However, as noted above, the "beneficial use" proviso in § 8 was intended to incorporate the states' appropriation laws, and thus encourage the development of more "perfect and uniform" state laws. See page 25, *supra.* Hence, the "beneficial use" test is the same under both federal and state law.

The United States also argues that the State Board found that the Bureau's proposed uses were not in the "public interest," rather than inconsistent with "beneficial use." U.S. Br. 143 n. 108. However, the record indicates that the State Board found that the Bureau's uses failed to meet both the "beneficial use" test and the "public interest" test. The decision states:

> "[T]he Bureau has presented no specific plan for applying project water to *beneficial use* for consumptive purposes at any particular location. . . .
>
> • • •
>
> By failing to present evidence of a specific plan to use the water conserved by the New Melones Project for consumptive purposes, the Bureau has failed in spirit if not in substance to meet the statutory requirements for approval of a permit to appropriate water for such purposes. . . . [T]he law requires the Board to examine each application and determine that the water to be appropriated will be placed to *beneficial use.* . . .

two ways. First, it is irrelevant whether the State Board found that the conditions are consistent with project purposes. Under the doctrine of finality, a prior decision cannot be collaterally attacked regardless of the findings on which it is based; all that can be collaterally attacked is the general jurisdiction of the court or agency which rendered the prior decision. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971). Second, the State Board made findings indicating that the conditions are consistent with project purposes. It found that the Bureau had failed to meet the "beneficial use" test; since the authorizing act incorporates the proviso in section 8 that requires the Bureau to meet this test, Pet. Br. 65-66, the findings indicate that the Bureau has failed to meet the test which Congress, in authorizing the project, required as the basis for the federal water right.

> In addition, the specific intended use must be evaluated and found to be reasonable, *beneficial* and in the public interest before a permit can issue. . . .
>
> • • •
>
> "The public interest requires that the use of the Stanislaus River for whitewater boating, stream fishing and wildlife habitat be protected to the extent that water is not needed for other *beneficial uses.*" App. II, 19-20, 21, 31. (Emphasis added.)

Further, the "beneficial use" test and the "public interest" test are identical under federal law. Wyoming's permit system, the first to be adopted by the western states, provided that a permit could not be issued if the proposed use was "detrimental to the public interest;" its permit system was the model for permit systems adopted by other states. 2 Wiel 1551, 1557-1558; Pet. Br. 33-34. It is apparent that this is the kind of system that Congress had in mind in encouraging the states, by the passage of section 8, to develop more "perfect and uniform" water laws. See page 25, *supra.* Thus, Congress, in inserting the "beneficial use" proviso in section 8, meant for the states to broadly determine whether the proposed water use was in the public interest, and consistent with sound public policy.

The United States had an opportunity to directly challenge the validity of the conditions in a judicial proceeding under California law, an opportunity which it chose to ignore. If the United States were allowed to thus ignore its state judicial remedies, and instead collaterally attack the validity of the conditions in subsequent federal proceedings after the time has elapsed for pursuit of its state remedies, the validity of the conditions would always be in doubt. The United States would always be free to challenge the conditions, whenever it decided that it no longer wished to be bound by them. Under these circumstances, the policy underlying the doctrine of finality, which is to vest prior legal proceedings with certainty, would be subverted. Indeed, the Bureau would be able to present a skeletal case in the state administrative proceeding, ignore its state judicial remedies, and then—months or even years after the administrative decision is rendered—present the bulk of its case in a federal court. Section 8 was intended, in part, to avoid this result by requiring federal compliance with state judicial remedies, not just with state administrative proceedings.

VI. THE SECRETARY WAIVES HIS OBJECTION TO CONDITIONS IMPOSED UNDER STATE LAW, WHEN HE ELECTS TO ACQUIRE HIS WATER RIGHTS UNDER STATE LAW.

The United States argues that the lower court properly rejected our contention that, when the Secretary elects to acquire his water rights under state law, he waives his objections to conditions which the state attaches to his rights. U.S. Br. 147; Pet. Br. 68-70. In fact, the Ninth Circuit ruled that the Secretary does not acquire his water rights as a matter of "comity," but instead is *required* to acquire his water rights under the "forms" of state law.

Under that result, the Secretary does not have the right to elect to comply with state law, but is required to do so. If the Secretary lacks the power to make an election, he obviously waives nothing. Nor do we argue otherwise.

Rather, our argument is in response to the United States' "comity" argument, an argument that was rejected by the Ninth Circuit. If the Secretary complies with state law as a matter of "comity," he has the power to make an election as to whether he should so comply. If he elects to comply, he obtains valuable benefits; he obtains a recognition and quantification of his water rights without an expensive, protracted "general stream adjudication." Pet. Br. 43-45, 69. If the Secretary elects to acquire these valuable benefits under state law, he should be required, as a matter of equity, to comply with the limitations of state law. Equity does not authorize him to retain the benefits of a state-granted water right, free of the burdens which the state attaches to the right. To the extent that the Secretary complies with state law as a matter of "comity," equity compels that he take both the benefits and burdens of state law.

VII. THE SECRETARY WAIVES HIS OBJECTION TO CONDITIONS ATTACHED TO PERMITS RESULTING FROM AN ASSIGNMENT OF STATE-FILED APPLICATIONS, WHEN HE ELECTS TO RECEIVE SUCH AN ASSIGNMENT.

The United States argues that the conditions of Decision 1422 are invalid even as applied to permits based on assigned applications for water rights. U.S. Br. 149; Pet. Br. 70-73. Its argument is that the assignments were not "expressly" conditioned on the acceptance of state-imposed conditions. *Ibid.* In fact, the record indicates that the Secretary received the assignments in the expectation that he

would be subject to state-imposed conditions.[33] Moreover, there can be no doubt that the State Board, in approving the assignments, provided such approval on the assumption that the Secretary would be subject to conditions which the State Board attached to the resulting permits. If any such doubt remains, the matter must be remanded to the State Board, so that the Board can determine whether the assignments should be approved without the conditions. See *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952); *Bank of America v. State Water Resources Control Bd.*, 42 Cal.App.3d 198 (1974).

CONCLUSION

For the foregoing reasons, we respectfully urge that this Court reverse the lower decision, and enter judgment in favor of the petitioners. The Court should hold that the Secretary of the Interior is required to comply with state law in acquiring and using unappropriated water under the Reclamation Act of 1902, except to the extent that state law impairs the purposes of Congress' reclamation projects. Further, it should hold that the United States is barred, by the doctrine of finality of judgments, from

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33. In applying to the State Board for approval of the assignments, the Bureau agreed that the resulting permits "shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article," and the article in turn provides that such permits shall be effective to the extent that the water "is used for a useful and beneficial purpose in conformity with this division of the [California] Water Code." App. II, 49, 57.

collaterally attacking the validity of the conditions of Decision 1422.

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Appendix 1

CONDITIONS OF DECISION 1422 (See page 55, supra)

1. CONDITIONS DEFERRING FULL IMPOUNDMENT.

Conditions nos. 1 and 2 authorize immediate impoundment for two project purposes (fish and wildlife protection, water quality control), and authorize the impounded waters to be used for the additional purposes of power and recreation. App. II, 33-34. The conditions defer the impoundment of water for consumptive (agricultural, municipal, industrial) purposes until the Bureau develops "firm commitments" for consumptive use, and satisfies the State Board that the "benefits" of its plan "outweigh any damage" to fish, wildlife and recreation in the upper Stanislaus basin. *Ibid.* The conditions also defer the additional impoundment of water for recreation and power purposes until the Bureau is authorized to impound additional waters for consumptive purposes. *Ibid.*

The United States argues that these conditions interfere with the congressional directive that the project be "initiated as expeditiously and prosecuted as vigorously" as possible, in that they "delay the expeditious realization" of the project benefits and prevent the project "from generating its full complement of revenue." U.S. Br. 64. However, as explained in our reply brief, any such delay in project benefits and revenue results from the Secretary's failure to develop a plan for consumptive use, not from the conditions that defer his rights to full impoundment until such a plan is developed. Pet. Rep. Br. 53.

The United States also argues that the conditions, by authorizing the State Board to "weigh" the "benefits" and "damage" of the Bureau's future water plan, enable the State Board to "determine whether purposes for which

Congress had authorized" the project "would be allowed to go forward." U.S. Br. 66. As explained in our reply brief, however, the State Board lacks such authority under section 8. Pet. Rep. Br. 54-55. If the conditions were construed as authorizing the State Board to deny water necessary to serve the congressionally-authorized purposes of the project, thus rendering the project economically infeasible, they would be overly broad. *Ibid.* To the extent that they permit the State to make determinations that do not conflict with express congressional determinations, they are within the power given to the State by section 8.

The United States also argues that the conditions impair the power purposes of the project. U.S. Br. 64. Our response to this argument is found in our reply brief. See Pet. Rep. Br. 54 n. 29.

2. CONDITIONS LIMITING OR CONTROLLING THE USE OF WATER.

Condition no. 4 requires a preference to be given to water users in the four counties which comprise the Stanislaus basin, App. II, 35, and condition no. 25 similarly requires a preference to be given to these four "counties of origin," *id.* at 40.

The United States argues that these conditions conflict with the congressional directive that the project shall be an "integral part" of the Central Valley Project, by preventing the Secretary from shipping project waters outside the Stanislaus basin. U.S. Br. 69. In fact, the conditions merely provide that the water shall be used in the Stanislaus basin until the Bureau develops a plan for consumptive use outside that basin, as required in conditions nos. 1 and 2. Moreover, the conditions are basically the same as the provision in the authorizing act providing a preference for

"existing and anticipated future needs" of the "Stanislaus River Basin." 76 Stat. 1191 (1962). The United States argues that the provision in the authorizing act vests the Secretary with exclusive authority to define the basin. U.S. Br. 69. However, the United States fails to show, or even argue, that the State Board has mis-defined the area. Indeed, the position which the United States now argues explicitly contradicts the position which it took in the hearings leading to Decision 1422. In those hearings, the Bureau's representative testified that the preference expressed in the authorizing act "specifically is for the water needs of the four counties." Df. Ex. 10, p. 145. Even after the State Board's decision, an objection to this condition was not raised in the Bureau's petition for rehearing. If the Secretary were, at a future time, able to show that the State Board has mis-defined the basin, such evidence should be offered to the State Board, so that it can change its conditions accordingly.

Conditions nos. 5 and 20 provide for interim maintenance of certain levels of water quality, based on levels which are contained in agreements between the Bureau and California agencies. App. II, 35-36. The United States argues that the conditions do not incorporate all provisions of the agreements, in that the agreements, unlike the conditions, provide for annual limitations on the amount of water released for such purposes. U.S. Br. 72. The conditions, however, mandate specific releases of only that amount which the Bureau recognized in its agreement as necessary for water quality. The State Board recognized, however, that the benefits to be achieved from such releases were dependent on the total dissolved solids (TDS) concentration in the released water; in other words, the benefits were dependent not only on the quantity but the *quality* of the

water. The State Board thus recognized that changes in water *quality* might require future larger release in order to achieve the same result; the requirement of further studies is directed to this point. Moreover, as the State Board noted, the failure of the Bureau to designate its place of use of the New Melones yield is the primary difficulty in determining the proper amount of releases. The Bureau's water quality expert testified to the State Board that "before the board could put any meaningful restrictions or permit terms on the Bureau, [the State Board] . . . would have to know where [the water] . . . is going to go." As he acknowledged, ". . . you can't make any predictions . . . about the effect of New Melones Dam on water quality in the lower San Joaquin until you know how the project is going to be operated and where the conservation yield is going to be used." Df. Ex. 10, pp. 247-248.

Most significantly, the United States does not, and cannot, argue that the conditions require the Bureau, in actual practice, to release more water than is provided in its agreements. Moreover, it is irrelevant whether the conditions precisely reflect the agreements. It is relevant only whether the conditions, under presently known facts, provide for proper levels of water quality control. The United States does not argue that, under presently known facts, the conditions provide for improper levels of water quality control; it could not so argue since the only releases now required reflect precisely the United States contractual agreement. It argues only that this is a matter within the exclusive discretion of the Secretary. Our response to that contention is set forth in our reply brief. See Pet. Rep. Br. 57.

Conditions nos. 5 and 20 also provide that the water quality levels provided therein may be modified, in accordance with any modification of the Water Quality Control

Plan for the San Joaquin Basin. App. II, 35-36, 39. The United States argues that this provision might enable the State Board, at a future time, to use "the full yield of the New Melones for water-quality purposes. . . ." U.S. Br. 74. As we note in our reply brief, such a result would render the project economically infeasible, and thus be beyond the authority of the State Board under section 8. Pet. Rep. Br. 55. Again, however, the effect of that reserved jurisdiction cannot properly be determined until the jurisdiction is actually exercised. See *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952); *Eccles v. Peoples Bank*, 333 U.S. 426 (1948); cf. *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968). We see no impediment simply in the reservation itself, especially where the inability to make a final determination is caused by the Bureau's own failure to develop firm alternative plans to the abandoned East Side Division.

3. CONDITIONS RESERVING JURISDICTION.

Condition no. 9 provides that the "maximum quantities stated herein may be reduced in the license if investigation warrants." App. II, 36. Condition no. 13 reserves the State Board's jurisdiction to regulate matters such as "method of diversion, method of use, and quantity of water diverted. . . ." App. II, 37. Condition no. 6 reserves jurisdiction for the purposes of establishing "dry year criteria," and of revising the conditions relating to water quality control releases and fish releases. App. II, 36.

The United States argues that these conditions enable the State Board to assert continuing jurisdiction over the project. U.S. Br. 75. However, if the State Board has jurisdiction to impose conditions, it obviously has jurisdiction to change its conditions on the basis of new infor-

mation. Otherwise, the State Board would be powerless to change conditions which have become anachronistic. As California's long historical experience has indicated, the proper management of water resources cannot be fixed as of a single moment, but depends on the circumstances of the time. *Joslin v. Marin Municipal Water District,* 67 Cal. 2d 132, 140 (1967). The United States' position would compel a contrary and unwise position, one which could not be responsive to changed circumstances.

The United States argues that, under these conditions, "all the purposes of the project that are dependent on water are affected, and there is no way for federal authorities to assure that those purposes are realized as Congress intended." U.S. Br. 78. However, we do not claim that the State Board has authority to adopt future conditions, under the conditions reserving jurisdiction, that prevent the achievement of multiple purposes of the project "as Congress intended." It cannot be determined here whether future conditions will be harmonious with project purposes, as authorized by Congress. That question can only be determined when, and if, the State Board adopts such future conditions.

4. CONDITIONS AFFECTING PROJECT CONSTRUCTION.

Conditions nos. 10 and 11 merely set a target date of December 1, 1980, for project completion, and December 1, 1990, for utilization of project water. App. II, 36. Their only purpose is to reflect the California statutory policy that an applicant should not be able to perpetually preserve an unused water right when the water might be otherwise beneficially used. Cal. Wat. Code §§ 1390, 1396, 1397. If the project is not completed within the time authorized, or its water not utilized within the time authorized, the Bureau can, of course, apply to the State Board for an alteration of the condition. Cal. Wat. Code § 1398. It cannot be imagined that the request would be denied, in light of the congressional directives of project purposes, and in the light of the substantial expenditure of federal funds for the project.

Condition no. 17 requires the Secretary to provide means to insure the release of waters which exceed those which the Bureau is now authorized to impound. App. II, 38. The United States argues that the outlet suggested by the State Board would affect project construction and design. It submits that the project, as planned, has no such outlet for insuring the release of such surplus waters. U.S. Br. 79. The United States pointedly fails to mention, however, that other methods can equally satisfy the condition; it does not claim an inability to meet the condition by means other than the suggested outlet pipe.

In any event, such a condition is necessary to protect the "beneficial use" of water, for otherwise the Secretary would be allowed to effectively impound more water than authorized in his permit. It hardly impairs the purposes or value of the project to require a means for the release of such waters.

Conditions no. 3 and 18 require the Bureau to clear the reservoir site of all "structures, trees, and other vegetation" that might impair the recreation purpose of the project, and "to show the manner in which clearing will progress as additional storage is authorized." App. II, 35, 38. The conditions thus seek only to facilitate achievement of the recreation purpose, and to protect the valuable resources of the upper reaches of the Stanislaus until full impoundment requires inundation. The conditions thus only reflect the concerns expressed in the conditions nos. 1 and 2, which defer full impoundment.

5. CONDITIONS IMPOSING REPORTING REQUIREMENTS.

Conditions nos. 3, 7, 8 and 12 require the Secretary to make periodic reports to the State Board, so that the Board can determine whether the permit conditions are being met. App. II, 34-35, 36. The United States argues that the requirements may lead to the necessity for further congressional appropriations. U.S. Br. 80. We find it difficult to credit the United States' assertion that the material in those reports would not otherwise be maintained by the Bureau as a matter of normal operating procedures. In any event, the cost of such reports would be an insignificant portion of the project, and thus the conditions do not have a substantial effect on project operations.

6. CONDITIONS REQUIRING PROJECT ACCESS.

Conditions nos. 15 and 16 provide for access to the project by the State Board so that the Board can insure that the permit conditions are being met, and for regulated access to the project by members of the public for fishing. App. II, 37-38. The United States argues that these conditions impinge on the Secretary's operational authority, and may affect security. U.S. Br. 82. However, the conditions are well within the State Board's power under California law to ensure the most beneficial uses of the impounded water. *Bank of America v. State Water Resources Control Board*, 42 Cal. App. 3d 198 (1974). They impose only minor obligations on the Bureau, and do not substantially affect the way in which it plans to operate the project.

Appendix 2

U.S. BUREAU OF RECLAMATION, "RECLAMATION INSTRUCTIONS"

Series 110 Project Planning

Part 116 Economic Investigations

CHAPTER 3 PROJECT FORMULATION

§ 116.3.1

INTRODUCTION

1. *Definition.* Project formulation is the process of selecting the purposes to be served, the physical means of development, and the size of the facilities and service area to be included in a project plan.

2. *Objectives.* The general objective of project formulation is to promote efficient development and utilization of water and land resources by means of engineering works. The structures are designed to alter the amount, time, and place of use for water resources, with the further objective of promoting economic growth and stability as a means for improving the quality of living conditions.

3. *Framework of Law and Policy.* State and Federal law and policy establish the framework for project formulation. Project plans must comply with State legal provisions or priorities for beneficial use of water, interstate water compacts, court decrees allocating water among States, water rights, and related matters. Project plans must also comply with Federal laws and policies, including a demonstration that anticipated project revenues are sufficient to cover reimbursable costs. In some cases, court decrees, State laws, and Federal policies have been modified to meet specific conditions in the authorization of particular projects.

4. *Viewpoint.* Formulation of project plans requires a viewpoint consistent with the national objectives of resource development. The engineering features are designed to provide economic and social gains of public significance, in contrast to works intended for the limited purpose of maximizing financial profit, rates of return on investment, or direct benefits alone. Thus, the comparison of revenues and costs used as a test of economic feasibility is not a sufficient basis for the formulation of project plans. The more comprehensive benefit-cost comparison, embracing indirect benefits and nonreimbursable purposes, constitutes one of the principal tools of project formulation consistent with national objectives.

5. *Basic Concept.* A properly formulated project is one in which each purpose or major segment will provide benefits at least equal to its cost. A major segment is an increment of size or use which can practically be added to or omitted from the project plan. An incremental analysis shall be made to test the advantages and disadvantages of such variations and to ensure selection of the most desirable plan. This process of formulation can be applied to plans of development for geographic or economic regions, river basins or tributary watersheds, projects or subdivisions of projects, and to reconnaissance or detailed investigations.

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Series 230 Irrigation O&M

Part 231 Policy and Basic Requirements

CHAPTER 5 RIVER REGULATION

§ 231.5.1

1. *Authority.* The Reclamation Act recognizes the interests and rights of the States in the utilization and control of their water resources and requires the Bureau, in carrying out provisions of the Act, to proceed in conformity with State water laws. Since the construction of a reservoir and

the subsequent storage and release of water for beneficial purposes normally entails stream regulation, it is necessary to reach an understanding with the States regarding reservoir operating limitations. Formalized argeements with the States and also with other agencies, both public and private, are desirable wherever the intricacy of established water rights, compacts, and other agreements require clarification or establishment of criteria within which river regulation can be accomplished. Proposed agreements which involve multipurpose operations, before formal submission to persons or agencies outside the Bureau should be reviewed by the Assistant Commissioner and Chief Engineer for technical adequacy.

2. *Coordination.* In varying degrees, the river regulation functions cut across established lines involving project investigations, power operations, and irrigation operations personnel. Design and construction personnel also have an interest with respect to their responsibilities for design of projects to meet operational requirements both during and subsequent to construction, for inspection of major structures and facilities, and for design of contract administration for major changes and repairs. During the planning and construction periods, project investigations personnel shall be responsible for sponsoring and coordinating the Bureau's river regulation function, both internally and externally. Upon the works being placed in operation and maintenance status, this responsibility shall pass to the irrigation operations and power operations personnel in keeping with their related interests. However, the Division of Project Investigations in the Commissioner's Office, Denver, will continue to provide technical advice and assistance in river regulation and water supply forecast matters. Whenever a consideration, either of new developments in a

partially developed basin or changes in purpose of utilization of the water resources in a fully developed basin, is required, the primary responsibility for the performance of such project planning investigations, to be conducted in collaboration with the appropriate irrigation or power operations personnel, or both, shall rest with project investigations personnel.

3. *Organization.* River storage and water utilization systems shall be operated subject to directives from a responsible operating official. The size and character of his organization will vary with conditions. River regulation units will be necessary when operations are extensive. Establishment of river regulation units shall be subject to the approval of the Commissioner upon the recommendation of the Regional Director, concurred in by the Assistant Commissioner and Chief Engineer.

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OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
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vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the Ninth Circuit Court of Appeals

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Respondent.

On Writ of Certiorari to the Ninth Circuit Court of Appeals

Brief of Amici Curiae States of Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Oklahoma, South Dakota, Texas, Washington and Wyoming in Support of Petitioners

STATEMENT OF INTERESTS OF AMICI CURIAE

Congress enacted the Reclamation Act of 1902 to tame and use the unharnessed waters and to reclaim the arid and semi-arid lands of the West. The Western States named herein as *amici curiae* constitute, with California, sixteen of the seventeen states subject to the provisions of the Act.[1] Pursuant to the Act, reclamation projects authorized by Congress span these *amici* states in the form of storage reservoirs, diversion dams, and other water works. Water deliveries from these project facilities at the end of 1974

1. The State of Utah has not joined this brief, but will file a separate brief in support of the Petitioners.

totaled 29.7 million acre-feet and served a record high of 17.6 million people (31% of the population of the 17 Western States). U.S. Department of Interior, Bureau of Reclamation, *Water and Land Resource Accomplishments,* 1974: Summary Report, 2.

When the United States, by the passage of the Reclamation Act, entered the field of building large scale irrigation projects, it carried forward a policy which it had long approved, encouraged and used: a policy of recognizing the laws of the states and territories as the sources of water rights. Thus, one of the fundamental concepts of the 1902 Act was Section 8:

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . ." 32 Stat. 390 (1902), 43 U.S.C. § 383 (1970).

An objective appraisal of the text of this provision would lead any fairminded observer to the conclusion that Congress intended that the government's right to divert and impound water for a reclamation project must be received from the state, and further that the acquisition of project water should be treated as an appropriation, which, consistent with congressionally approved western water laws, can only be based on beneficial use. *United States v. Bennett,* 207 F. 524 (9th Cir. 1913); *West Side Irrigation Co. v. United States,* 246 F. 212 (9th Cir. 1917); *see* F. J. Trelease, *Arizona v. California,* 1963 Supreme Court Review 158, 189.

The Bureau of Reclamation, charged with administering the Act, has historically followed the plain instructions of Section 8 in acquiring water for reclamation projects. In *United States v. Gerlach Livestock Company,* 339 U.S. 725 (1950), the Supreme Court quoted a statement of the Bureau with respect to Section 8 as follows:

> **"'. . . [T]he Bureau of Reclamation and the Secretary of the Interior have consistently, through the forty two years since the 1902 act, been zealous in maintaining compliance with Section 8 of the 1902 act. They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws. Ample demonstration of the effect of this law and policy of administration, in action, has been given in connection with the Central Valley Project. Water filings made by the State have been obtained by the Bureau of Reclamation by assignment. . . .'" 339 U.S. 725, 740-41, n. 15.**

The Ninth Circuit's decision pays little heed to either the language or purposes of Section 8, or to the way in which the Section has historically been recognized and followed by federal and state agencies since 1902. According to the Ninth Circuit, the section requires the Bureau of Reclamation to apply for an appropriative permit from the state, requires the state to issue the permit if unappropriated water is available, and frees the Bureau of conditions imposed in such permits by the state. This is not what the section says, or how the section has been historically applied. The court has thus sanctioned an alteration of several decades of settled administrative practice. It has further eliminated the operation of California state law provided for in the Reclamation Act with respect to the

acquisition and use of project water by the Bureau, notwithstanding that the state's destiny is substantially influenced by how these waters are used.

Although the Ninth Circuit's decision necessarily applies only to the State of California, its holding rests on a fundamental misconception of the meaning and purposes of Section 8 of the 1902 Act. That misinterpretation, applied to the other *amici* states, would eliminate any discretionary authority of the states to control the allocation of water stored at federal reclamation facilities. The *amici* thus urge that the judgment of the Court of Appeals be reversed.

STATEMENT OF THE ISSUES

This case presents the question whether, under the Reclamation Act of 1902, the United States, acting through the Bureau of Reclamation (the "Bureau"), must obtain and comply with permits issued by the State of California, acting through its State Water Resources Control Board (the "State Board"), in instances where the Bureau seeks to acquire unappropriated water for reclamation purposes.

STATEMENT OF THE CASE

In its complaint for declaratory relief, the United States claimed that (1) the Bureau need not apply to the State Board for a permit to obtain unappropriated water for a federal reclamation project, (2) if the Bureau applies for such a permit as a matter of "comity," the State Board must grant the permit if unappropriated water is available, (3) in the latter event, the State Board cannot impose any conditions in the permit, and (4) Decision 1422, a decision rendered by the State Board which imposes conditions in permits issued to the Bureau to acquire water for the New Melones Project in California, is void in all respects "where that decision conflicts with or contravenes federal law."

California contended that, (1) under federal law, the Bureau must obtain and comply with permits issued by the State Board in acquiring unappropriated water for federal reclamation projects, (2) under federal law, the State Board may impose conditions in such permits, to the extent that such conditions are not inconsistent with Congress' reclamation laws or policies, (3) the conditions imposed in Decision 1422 are not inconsistent with Congress' reclamation laws and policies, and thus are authorized by federal law, and (4), assuming *arguendo* that the Bureau need not obtain a permit from the State Board to acquire unappropriated water, the Bureau must comply with conditions in such permits when it elects to obtain such permits.

The trial court's decision is reported at 403 F.Supp. 874 (E.D. Cal. 1975). The court granted summary judgment for the United States, and denied California's motions for summary judgment and for judgment on the pleadings. In its decision, the trial court ruled that the Bureau "must" apply to the State Board for a permit to acquire unappropriated water, as a matter of "comity." *Id.* at 889-90. However, the court ruled that the State Board *must* issue such a permit once it determines that unappropriated water is available, and may not impose conditions in such a permit. *Id.* The court also rejected California's view that the Bureau must comply with conditions in such permits, when it elects to obtain such permits. The court accordingly voided Decision 1422 to the extent that it imposed conditions in permits issued to the Bureau.

The Court of Appeals affirmed the judgment with only one exception. 558 F.2d 1347 (9th Cir. 1977). It concluded that the requirement for application to the State Board

was not a matter of "comity," but a requirement of Section 8 of the 1902 Reclamation Act.

The brief of the petitioners provides a thorough discussion in its "Statement of the Case" of the legislative history of the New Melones Project. California's appropriative procedures, including those factors upon which the State Board must base all water allocation decisions, and the specific action (Decision 1422) which gave rise to the present litigation. In the interest of brevity, this discussion will not be repeated here.

ARGUMENT

1. The Lower Court Decisions, in Exempting the Bureau of Reclamation from State Permit Systems, Alter Several Decades of Settled Administrative Practice.

The Bureau of Reclamation has consistently complied with the states' appropriation laws, including the permit systems on which those laws are based, since the passage of the Reclamation Act of 1902. Also, the Bureau has consistently acknowledged, since 1902, its obligation to comply with the states' appropriation laws. Therefore, the Ninth Circuit's affirmance of the District Court judgment alters several decades of settled admintrative practice.

In 1956 hearings before the Subcommittee On Irrigation and Reclamation of the Senate, a representative of the Department of the Interior stated that the official position of Interior regarding the coverage and effect of Section 8, was that Section 8 completely controls the acquisition of water rights for the project. Hearings on S. 863 before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 84th Cong. 2d Sess. 101 (1956).

The Bureau has recognized its obligation to comply with state law in the acquisition of water rights in its internal regulations. Under the heading "Project Formulation" in the Bureau's "Instructions" dated July 16, 1959, it is asserted that:

> "Project plans must comply with state legal provisions or priorities for beneficial use of water, interstate water compacts, court decrees allocating water among states, water rights, and related matters." Instructions, § 116.3.3 (July 16, 1959).

Under the heading of "River Regulation," dated January 10, 1957, the Bureau advises that:

> ". . . the Reclamation Act recognizes the interests and rights of the states in the utilization and control of their water resources and requires that the Bureau, in carrying out provisions of the Act, proceed in conformity with state water laws. Since the construction of a reservoir and the subsequent storage and release of water for beneficial purposes normally entails stream regulation, it is necessary to reach an understanding with the state regarding reservoir operating limitations." Instructions, § 231.5.1 (January 10, 1957); *see* C. Wheatley & C. Corker, *Study of the Development, Management and Use of Water Resources on the Public Lands* 327-28 (1969).

As recently as October 10, 1975, even after the District Court's decision, the Commissioner of Reclamation stated:

> "We recognize that the ultimate right to store, divert, and utilize water in accordance with applications made pursuant to state laws is one of the key elements of past, present, and future development in the West. Each state has the duty to determine under its own statutes how its unappropriated water is to be

used. Since 1902, the Bureau has consistently taken the position that it will obtain under state law its rights to store and divert water for its projects recommended for Congressional authorization." Remarks by Gilbert G. Stamm to the California Water Resources Assn., San Francisco, California, Oct. 10, 1975.

Consistently with the above statements and instructions, the Bureau has in fact complied with state laws in the initiation of a project, even in those cases in which delay or inconvenience in implementing the project is the price of compliance. Thus, in one case a project was classified as detrimental to the public interest and the state permit was issued only after the federal government, through negotiations, modified its water right application. *See* Trelease, *Reclamation Water Rights,* 32 Rocky Mtn. L. Rev. 464, 466-69 (1960). Another case involved a Bureau plan to divert the water of a river contrary to the terms of a state statute and before implementing the project, the federal government agreed to provide a separate storage dam. *Id.*

On the other hand, in order to facilitate compliance with Section 8 requirements, a number of the Western States have made special provisions for the government appropriation of water which tend to facilitate appropriation. *Id.*

As the petition of the State of California points out, California has enjoyed 75 years of similarly successful accommodation between federal and state interests in the reclamation program. Nevertheless, the Ninth Circuit has chosen to abrogate the state's role in California's reclamation projects. Therefore, the *amici* urge the Court to reverse the judgment below, not in order to establish a new, untested federal-state relationship in California, but to continue this historic and successful partnership.

2. The Ninth Circuit's Decision Overturns That Which Congress Intended to Accomplish in 1902, and Re-Writes Federal Reclamation Law by Developing a New Water Doctrine Not Contemplated by Congress.

Because in vast areas of the West rainfall is slight and water is precious, public policy dictated a rule of law under which water rights could be lost by non-use and acquired only by beneficial use of water. Under the appropriation approach, the first to make a beneficial use of water is protected in that right to the extent of his use. What is a "beneficial use" is determined by the law of the state in which the use occurs. Thus the appropriation doctrine enables the state to prevent waste and mismanagement of its waters and, unlike the riparian doctrine, vests the state with broad control over its waters.

To help facilitate settlement of the West, Congress gave its approval to this water law practice. Thus, in the Mining Act of 1866, Congress confirmed vested rights for mining, agricultural, manufacturing and other purposes that were recognized by the local laws and customs, and approved the appropriative system as a method of obtaining future water rights. 14 Stat. 262 (1866), 43 U.S.C. § 661 (1970); *Atchison v. Peterson,* 87 U.S. (12 Wall.) 507 (1874); *Basey v. Gallagher,* 87 U.S. (12 Wall.) 670 (1874). The Desert Land Act of 1877 encouraged the settlement of irrigable lands by making large tracts available to those who would reclaim them. The Act declared that all non-navigable sources of water on the public domain were held free for appropriation. 19 Stat. 377 (1877), as amended, 43 U.S.C. § 322 (1970). The Court has held that, by this Act, all these waters were severed from the land and reserved for the public under the laws of the states and territories. *California-Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935).

It was with this statutory background that the 1902 Reclamation Act was passed. As with the earlier Acts, western congressmen were again successful in securing in the federal enactment provisions which reserved to the states broad control over their water resources so that they could participate in the reclamation process in a very fundamental way. Thus, Section 8 of the 1902 Act provides:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . ." 32 Stat. 390 (1902), 43 U.S.C. § 383 (1970).

It is difficult to conceive of any other statutory language which could make clearer that the Bureau of Reclamation in developing water resources in the West is obliged to respect the state's regulatory authority in securing unappropriated water in the state for development of a particular project.

Furthermore, the legislative history of Section 8 removes any doubt that the Section was intended to require the Secretary to comply with state laws both in acquiring and distributing project water. Several senators and congressmen addressed themselves to this question during the 1902 congressional debates. Congressman Mondell of Wyoming, the spokesman for the bill in the House of Representatives, responded at length to a question asking for clarification "upon the subject of national or state control." 35 Cong. Rec. 6677, 57th Cong., 1st Sess. (1902). He responded by

quoting President Theodore Roosevelt for the proposition that "the distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws." *Ibid.* He stated that Section 8 merely followed traditional federal legislation "recogniz[ing] local laws and customs appertaining to the appropriation and distribution of water used in irrigation." *Id.* at 6679. The motto which he used to describe the scheme of the reclamation bill was "National Expenditure, Local Administration." *Id.* at 6677. Indeed, in all the legislative history of this hotly debated Act, no Senator or Congressman dissented from this construction of the Act. Further, no Senator or Congressman suggested the view that was the basis of the Ninth Circuit's decision.

The Ninth Circuit's decision inexplicably makes no reference to the extensive legislative history, or to the administrative practice of the Bureau of Reclamation in complying with the states' appropriation laws under Section 8. Instead, the court holds simply that Section 8 requires the Bureau to obtain a permit under state law, but not to comply with conditions in the permit. However, nothing in Section 8 supports any distinction between a permit and its conditions. The court stated that its conclusion is supported by the fact that California did not develop its permit system until after 1902. 558 F.2d at 1350. If this is so, then on what basis does the court conclude that Section 8 requires the Bureau to comply with the "forms" of the states' permit procedures? If the Section is sufficiently clear to require the Bureau to obtain a permit under state law, it is sufficiently clear to require the Bureau to comply with conditions in the permit. Thus, the court appears to have re-written the federal reclamation laws, and, as suggested in the concurring and dissenting opinion, to have developed a new "federal

common law." 558 F.2d at 1352, n. 2. If the federal reclamation laws are to be re-written, such is the task of Congress, not the courts.

3. The Judicial Decisions Interpreting the Reclamation Act Do Not Support the Court of Appeals' Decision.

The Court has upheld the literal interpretation of Section 8 which requires the Bureau to comply with state laws in acquiring water for reclamation purposes, even to the extent that such laws condition the use of such water. Thus, in *Nebraska v. Wyoming,* 295 U.S. 40 (1935), the Court declared:

> ". . . [T]he Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law." 295 U.S. at 43.

The Court further noted that "all of the acts of the Reclamation Bureau in operating the reservoirs so as to impound and release waters of the rivers are subject to the authority of Wyoming . . ." *Id.* at 42.

Thus, the Court unequivocally ruled that the Secretary is fully subject to state appropriation laws. The Court some ten years later approved the above language. *See Nebraska v. Wyoming,* 325 U.S. 589 (1945). The Court further stated that Congress, in passing Section 8, had chosen to require the Secretary to "proceed in conformity with" state appropriation laws, and indeed that the Secretary had in fact complied with these laws by obtaining permits from state officials. *Id.* at 611-13, 616. These permits, the Court noted, contained various conditions. *Id.* at 613.

The next Supreme Court decision to consider the interpretation of Section 8 was *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958). The issue in *Ivanhoe* was extremely simple: Was Section 8 intended to override Section 5 (limiting the size of farms receiving reclamation water to 160 acres), where state law embodied a policy against such a limitation? The obvious answer was given: (1) To the extent there was a conflict between the particular language of Section 5 and the general language of Section 8, the former prevailed, and (2) to the extent federal law embodied in Section 5 conflicted with state law, the former also prevailed under the Supremacy Clause:

> "We read nothing in Section 8 that compels the United States to deliver water on conditions imposed by the state. To read Section 8 to the contrary would require the Secretary to violate Section 5, the provisions of which have been national policy for over half a century." 357 U.S. 275, 291-92 (1958).

In short, all the Court in *Ivanhoe* held was that Section 8 does not require the federal government to comply with state law which would frustrate an explicit national policy expressed in the Federal reclamation laws relating to the delivery of project water. However, the Court did not conclude that state law could not apply to acquisition and distribution of water where no national policy was frustrated; indeed, it specifically noted that federal compliance with state laws was necessary to "acquire water rights or vested interests therein . . ." *Id.* at 291.

In *City of Fresno v. California,* 372 U.S. 627 (1963), individual and municipal water users contended that California statutes gave a statutory priority to the use of water for municipal or domestic purposes and that, since Section 8 required compliance with state laws in the acquisi-

tion of such vested water rights, the Bureau could not acquire and utilize their rights for irrigation purposes pursuant to the Bureau's eminent domain powers under Section 7 of the 1902 Act. The Court rejected their position, holding:

> ". . . [S]ection 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. . . . Rather, the effect of Section 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made." *Id.* at 630.

Thus, the *City of Fresno* case can best be understood as the application of a quite narrow and traditional canon of statutory interpretation: that the specific controls the general; that is, where Congress has laid down a specific mandate, that specific mandate may not be ignored in favor of a general policy of deference to state law. Although this view seems questionable in view of the congressional debates, it is clear that it provides no guidance in this case, since it does not deal with the power of the federal government to obtain rights to unappropriated water without compliance with state procedures. Indeed, the trial court properly noted that the *City of Fresno* decision "is not particularly relevant to the inquiry in this case." 403 F. Supp. at 892.

The Court's lengthy decision in *Arizona v. California,* 373 U.S. 546 (1963), also sheds no light on the specific legal issue before this Court. The states argued in that case that Sections 18 and 14 of the Boulder Canyon Project Act required the Secretary, in distributing project water, to comply with the laws of the states. Section 18 of the Act

contains language similar to that found in Section 8 of the 1902 Reclamation Act, except that Section 18 does not require the Secretary of the Interior to "proceed in conformity with" state laws. 45 Stat. 1057 (1928), 43 U.S.C. § 617q (1970). Section 14 of the Act provides that the project shall be operated pursuant to the general reclamation laws, "except as otherwise herein provided." *Id.* at § 617m. The Court however, relying on Section 5 of the Act, rejected the states' argument. Section 5 provides that no person may receive water from the project except pursuant to a contract with the Secretary. *Id.* at § 617d. The Court interpreted this section as giving the Secretary exclusive authority to determine the distribution of project water, to the exclusion of state authority. 373 U.S. at 579-585.

Thus, the Court again resolved a conflict between a specific statute, Section 5, and general statutes, Sections 18 and 14, similar to the approach of the Court in the *Ivanhoe* and *City of Fresno* cases. For this reason, the District Court properly concluded that *Arizona* did not control the question raised by this case; that is, whether the federal government, acting through the Bureau, must obtain and comply with permits necessary under state law for the appropriation of water.

In summary, subsequent decisions have not altered the literal interpretation of Section 8 recognized by the Supreme Court in *Nebraska v. Wyoming* with respect to the Bureau's obligation to acquire and use water for reclamation projects in conformity with state laws. Rather, at best, these subsequent decisions stand merely for the proposition that state laws cannot frustrate national policies expressed in Federal reclamation laws relating to the acquisition and delivery of project water.

4. In the Interests of Sound Public Policy, the Fundamental Accommodation of Federal and State Interests Achieved in the Reclamation Act of 1902 and Implemented with Success for Decades Should Not Be Discarded.

Decisions regarding the allocation of unappropriated water among competing demands have dramatic significance in the Western States. In determining where water will be diverted and used, a decision is directly made as to the locale of future growth and community development. In addition, by allocating an amount of unappropriated water to a selected beneficial use, the supply available for competing uses also within the state's legitimate concern is reduced. These decisions and determinations, although they will ultimately have import to some extent to the nation as a whole, have a significantly more profound effect on the development of the state, as they will shape the priorities for water uses between the state's farmers, cities and industries, and between these uses and competing environmental uses. Thus, determinations as to the use of water in the West involve a delicate and complex balancing of benefits and costs associated with each competing use of water and area of use. In exercising this responsibility, the states have developed elaborate administrative machinery which insures that the public will be allowed to fully participate in appropriation hearings, and to provide information relating to competing water needs.

On the other hand, it is not realistic to assume that Congress has a comparable level of interest regarding water management affairs, unassociated with navigation, within an individual state. Nor is it realistic to assume that Congress has the time or expertise to involve itself in the details of state water management, even assuming an inclination to do so. Thus, Congress, in authorizing reclamation projects throughout the West, provides few specifics in the authorizing legislation with respect to eventual project design, capacity and schedule of water use.

Congress was undoubtedly influenced by these considerations of public policy in providing for state control of the acquisition, use and distribution of reclamation project water. The result was that the 1902 Reclamation Law set up a dual control, a partnership between nation and state. Under this accommodation, the federal government is to build and operate the reclamation projects, and the states are to control the acquisition and use of water for the projects, as well as its distribution. Thus, the states were provided a voice in the projects that the national government had to respect. Not coincidentally, both federal and state authorities have faithfully honored this accommodation ever since the Act's passage.

Of course, this is not to say that state laws may override Congressional objectives as expressed in Congress' reclamation laws. This Court has made it clear that the Supremacy Clause countenances no such interference. *Ivanhoe Irr. Dist. v. McCracken, supra*, 357 U.S. 275; *City of Fresno v. California, supra*, 372 U.S. 627. However, where state and federal laws do not conflict, state laws should be allowed to operate. To do otherwise is to allocate exclusive decision-making power on water resources development to the federal government, despite the legislative history, judicial precedent, administrative construction and the plain meaning of the Reclamation Act itself. The fact that the project interferes with the state's own program for water development and conservation will be to no avail. The state will have no opportunity to have a voice in the project no matter what its effect. If the broad holding of the Ninth Circuit is not reversed, even conditions imposed in permits by California in order to protect prior rights will at best be con-

sidered merely advisory. Such complete bureaucratic autonomy is the exact antithesis of the western system of property rights in water.

CONCLUSION

The Western States joined in this brief as *amici curiae* are deeply concerned about the Ninth Circuit's decision in this case. It sanctions in California a reversal by the Bureau of Reclamation of a policy of complying with state laws in the acquisition and use of project water, a policy which has been faithfully followed throughout the Western States for 75 years. This policy was the product of the simple observation by Congress that the states have systems of local water law adapted to local water supply, climate and demand. The Federal Government does not. Therefore, Congress established a partnership between the federal and state governments whereby the federal government was to build and operate reclamation projects and the states, within the limits described in this brief, were to control the acquisition and use of project waters. Of course, it is not suggested that conditions imposed by a state in a permit issued to the Bureau of Reclamation for a reclamation project can either contradict an explicit provision or policy of federal law, or render a specific project useless. It is argued, however, that the states must have not only the power to determine the existence of unappropriated water, but also to give effect to provisions of state law, where appropriate, concerning the public interest, and to include in their determinations those conditions essential to the protection of existing rights. No court until now has sought to dissolve that congressionally established partnership. The clear dictates of Section 8 of the 1902 Reclamation Act and sound principles of public policy require that this partnership be continued. The *amici* urge therefore that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion of Charles J. Meyers for Leave to File Brief Amicus Curiae and Amicus Curiae Brief

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Motion of Charles J. Meyers for Leave to File Brief Amicus Curiae and Amicus Curiae Brief

Pursuant to Rule 42(3) of the Rules of this Court, Charles J. Meyers respectfully moves the Court for leave to file the attached brief *amicus curiae* in the above entitled case. The petitioners have granted their consent for the filing; the letter granting such consent is attached hereto as Appendix A. The respondent has not granted its con-

sent, but has indicated that it will not object to this motion; the letter stating the position of the respondent is attached hereto as Appendix B.

The petition for a writ of certiorari was granted on December 5, 1977. Under Rule 41(1) of the Rules of this Court, the petitioners' brief was accordingly due no later than January 19, 1978. Although that brief has now been filed, this motion is timely under Rule 42(3) since it and the accompanying brief *amicus curiae* are "presented within the time allowed for the filing of the brief of the party supported."

INTEREST OF THE AMICUS

Amicus is Professor of Law and Dean of the Stanford Law School. For twenty years, since he was law clerk for the Special Master in *Arizona v. California*, 373 U.S. 546 (1963), about one-half of his professional career has been devoted to water law. He is the author or co-author of numerous works on that subject, including a 127-page article entitled "The Colorado River," 19 Stan. L. Rev. 1-75, 367-419 (1966), which at pages 58-65 discusses the interpretation of Section 8 of the Reclamation Act of 1902, the principal issue in the case now before the Court. He is co-author of Meyers and Tarlock, *Water Resources Management* (1971) which treats the same issues at pages 501-510. Finally, he was Associate Counsel of the National Water Commission and had the primary responsibility for drafting Chapters 13 and 14 of the Final Report, *Water Policies for the Future* (1973), which chapters deal with federal-state relations in water resource development.

Amicus has no client in this case and has refused offers of employment from would-be clients. His interest as an academic lawyer is to advise the Court of what is perceived to be errors in the interpretation of Section 8 of the 1902

Reclamation Law to the end of improving the law, removing conflicts between federal and state governments in the construction and operation of water development projects and delineating the proper roles of the two levels of government in this strife-ridden area of resource management. The *amicus* thus stands in the historical tradition of "an essentially professional relation" to the Court rather than advocating a particular client's interest as *amicus curiae*. Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy," 72 Yale L. J. 694, 703 (1963).

CONCLUSION

For each of the foregoing reasons, the motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

CHARLES J. MEYERS
Stanford Law School
Crown Quadrangle
Stanford, California 94305

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief Amicus Curiae of Charles J. Meyers

SUMMARY OF ARGUMENT

This case involves the construction and application of Section 8 of the 1902 Reclamation Law, 32 Stat. 388 (1902), as amended 43 U.S.C. §§ 371 *et seq.* (1970). It is time to reaffirm the correct interpretation of this provision.

It is the contention of *amicus* that in constructing a water project pursuant to the reclamation laws, the Secretary of

the Interior is presumptively bound by Section 8 to "proceed in conformity with" state laws "relating to the control, appropriation, use, or distribution of water used in irrigation." (The full text of Section 8 is in the Appendix.) The presumption may be overridden by a provision in a reclamation law which either explicitly or implicitly states a federal objective that would be frustrated by conforming to state law.

Amicus believes that three important cases contain language contrary to the express mandate of Section 8, thereby causing confusion and conflict in the management of water resources. They are *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958); *City of Fresno v. California,* 372 U.S. 627 (1963); *Arizona v. California,* 373 U.S. 546 (1963). These cases erroneously interpret Section 8 as placing no constraints on the Secretary; on the contrary, they construe Section 8 as invoking state law solely for the purpose of defining property rights entitled to compensation under the Fifth Amendment when taken in the construction or operation of a reclamation project. All three cases were relied on by the District Court in this case; they were also relied on by the Court of Appeals, in that it stated that the District Court's judgment should be affirmed "substantially for the reasons stated by Judge MacBride in his opinion."

ARGUMENT

I. PRIOR TO IVANHOE, CITY OF FRESNO AND ARIZONA V. CALIFORNIA, THE SECRETARY WAS REQUIRED TO CONFORM TO STATE LAW IN OPERATING RECLAMATION PROJECTS, AND THE SECRETARY UNIFORMLY COMPLIED WITH THE LAW IN PRACTICE.

The law, and the practice of the Secretary, from 1902 onward is described in *Nebraska v. Wyoming,* 325 U.S. 589 (1945). In an equitable apportionment case in the original jurisdiction of this Court, the United States claimed for two

reclamation projects water rights free from state control. The Court rejected the claim in an opinion by Mr. Justice Douglas (325 U.S. at 613-15):

> "Initiation of both projects was accompanied by filings made pursuant to § 8 in the name of the Secretary of the Interior for and on behalf of the United States. Those filings were accepted by the state officials as adequate under state law. They established the priority dates for the projects. There were also applications to the States for permits to construct canals and ditches. They described the land to be served. The orders granting the applications fixed the time for completion of the canal, for application of the water to the land, and for proof of appropriation. Individual water users contracted with the United States for the use of project water. These contracts were later assumed by the irrigation districts. Irrigation districts submitted proof of beneficial use to the state authorities on behalf of the project water users. The state authorities accepted that proof and issued decrees and certificates in favor of the individual water users. The certificates named as appropriators the individual landowners. They designated the number of acres included, the use for which the appropriation was made, the amount of the appropriation, and the priority date. The contracts between the United States and the irrigation districts provided that after the stored water was released from the reservoir it was under the control of the appropriate state officials.
>
> "All of these steps make plain that those projects were designed, constructed and completed according to the pattern of state law as provided in the Reclamation Act. We can say here what was said in *Ickes v. Fox, supra,* pp. 94-95: 'Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use

> of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy v. Kerr,* 296 Fed. 536, 544, 545. The government was and remained simply a carrier and distributor of the water *(ibid.),* with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.'
>
> "The property right in the water rights is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. See *Murphy v. Kerr,* 296 F. 536, 542, 544, 545: *Commonwealth Power Co. v. State Board,* 94 Neb. 613, 143 N.W. 937; *Kersenbrock v. Boyes,* 95 Neb. 407, 145 N.W. 837. Indeed § 8 of the Reclamation Act provides as we have seen that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.'
>
> "We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. We have a compliance with that direction. . . ."

In the succeeding paragraph, Justice Douglas deals with the contention of the United States that its management of federal projects would be jeopardized unless its claims, free of Section 8 constraints, were recognized. He isolates the issue exactly: "We do not suggest that where Congress has

provided a system of regulation for federal projects it must give way before an inconsistent state system." 325 U.S. at 615. That is the proper focus of inquiry: do other provisions of a reclamation act reflect an intent to modify the directive of Section 8? If so, of course the modification stands. If not, Section 8 remains in full force and state law applies.

II. IVANHOE, CITY OF FRESNO AND ARIZONA V. CALIFORNIA INCORRECTLY AND UNNECESSARILY DEPART FROM THE PRIOR LAW AND PRACTICE.

The first departure from the law and practice set forth in *Wyoming v. Nebraska* known to *amicus* is found in *Ivanhoe Irrigation Dist. v. McCracken,* 357 U.S. 275 (1958), where the Court said (at p. 291-2): "As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein."

This language was wholly unnecessary to the decision, for the issue, as the Court fully understood, was whether Section 8 could be construed to override Section 5 of the same 1902 Reclamation Law. The Supreme Court of California had been persuaded to declare that the law of California forbade restrictions on irrigation water deliveries based on the size of the farm. (47 C.2d 597 at 637.) The California Court then proceeded to hold that since Section 8 required conformity to state law, the Secretary was required to deliver reclamation water to excess lands in California in defiance of the express provision of Section 5, which limits water deliveries to 160-acre farms. The California Court's decision was preposterous: it is inconceivable that Congress intended Section 8 to overrule a provision of the 1902 law that embodied a land tenure policy of the

nation dating back to Thomas Jefferson and carried forward in such laws as the 1862 Homestead Act under which most of the Midwest and West was settled. The denigration of Section 8 in *Ivanhoe* could easily have been an outraged response to the attempt to use the section to secure for large landowners in California an exemption from a policy embedded in history, explicit in the law, and ratified in the political fights that denied to California any exemption from the 160-acre limitation.

Ivanhoe was an easy case that made good law but a bad *dictum.* The repetition of that *dictum* in two subsequent cases should not obscure its doubtful origin.

City of Fresno v. California, 372 U.S. 627 (1963), relies on the *Ivanhoe dictum* to support an apparent holding which drastically confines the operation of Section 8. (We say "an apparent holding" because the rationale of the decision is unclear, as will be explained presently.)

In the massive and bitter Friant Dam litigation [*Dugan v. Rank,* 372 U.S. 609 (1963)], the City of Fresno intervened, seeking declaratory relief on four claims: (1) rights to ground water, (2) statutory priority, under California law, for muncipal and domestic use, (3) entitlement to water at the same (lower) price charged to irrigators and (4) prior rights to water under the California area-of-origin law. This Court rejected all four claims. As to the first, the Court properly held that if Fresno's groundwater had been taken, the appropriate relief was under the Tucker Act. Fresno's second and third claims smacked of the overreaching in *Ivanhoe*: both were made in the face of explicit statutory provisions preferring irrigation use over domestic and municipal use. The governing statute, Section 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1194, as amended, 43 U.S.C. § 485h (c), specifically provided that

no contract should be made for municipal water unless the Secretary determined that irrigation project efficiency would not be impaired. Similarly, the same section authorized the Secretary to charge more for municipal water than for irrigation water. Fresno sought to avoid these statutory mandates through the *Ivanhoe* device of finding state law contrary to the mandate and then claiming that Section 8 overrode the mandate. The effort quite properly failed.

But the area-of-origin laws of the State of California presented a different question. They do not create a property right compensable under the Tucker Act. Instead they establish a state regulatory scheme for the allocation of water. True, this state regulatory scheme could be overridden by federal law—and perhaps it was by the same Section 9(c) that overrode the state law preference for municipal use over irrigation use, or by some other provision of the Friant Dam legislation. But such was not the ground for decision. The Court relied instead on the *Ivanhoe dictum* to nullify Section 8 and thereby pretermit an inquiry into conflict between federal objectives and state objectives. The Court said (372 U.S. at 629-30):

> Petitioner seems to say that § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383, requires compliance with California statutes relating to preferential rights of counties and watersheds of origin and to the priority of domestic over irrigation uses. However, § 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. This was settled in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958). Rather, the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made.

This use of *Ivanhoe* elevates an ill-considered *dictum* to apparent holding. That case does not hold that Section 8 is a compensation statute only; it holds that a specific provision of the Reclamation law forbidding delivery of water to excess lands is not overridden by a general provision of the same statute deferring to state law. What the Court appears to say in *Fresno* is: if you cannot claim that a property right has been taken away from you, you cannot claim under Section 8. But the words of Section 8—"proceed in conformity with" the "laws of any state . . . relating to the control, appropriation, use, or distribution of water" —simply will not bear that interpretation.

At the outset of this analysis of *Fresno*, some uncertainty was noted about the rationale of the case. Following immediately after the language quoted above, the Court goes on to say, in essence: in any event, California law (citing no authority) does not give Fresno the area-of-origin protection it claims, anyway. 372 U.S. at 630. But whether the quoted language was necessary to the decision or not, the Court should disavow it in this case.

The third of the tragic trilogy, *Arizona v. California*, 373 U.S. 546 (1963), relies on the *dictum* in *Ivanhoe* and the ambiguous decision in *Fresno* to hold that Section 8 has no influence on the intrastate distribution of Boulder Canyon Project water. It is, of course, clear that Section 8 (which was incorporated in the Project Act as Section 14 and was substantially restated in Section 18) is inapplicable to the interstate allocation of Colorado River water. But the Court, in a five to three decision, went further to declare (373 U.S. at 586-7): "The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this Court in *Ivanhoe Irr. Dist. v. Mc-*

Cracken, . . . and reaffirmed in *City of Fresno v. California*. . . ." The majority then quotes the misbegotten *Ivanhoe dictum* that § 8 merely requires the United States to comply with state law when it condemns water rights. The majority then concludes with this *non sequitur*: "Since Section 8 . . . did not subject the Secretary to state law in disposing of water in that case [the *Ivanhoe* case], we cannot, consistently with *Ivanhoe*, hold that the Secretary must be bound by state law in disposing of water under the Project Act." (373 U.S. at 587.)

A decision that Section 8 of the Reclamation law was not intended to repeal Section 5 of the same law hardly decides the question of the relationship of federal and state law in the local distribution of project water. From an easy case that made good law—namely that Californians could not evade the 160-acre limitation by concocting a spurious state law that somehow overruled the specific mandate of Section 5 of the 1902 Reclamation law—this Court has pushed the *dictum* of *Ivanhoe* to the point that Section 8 has no meaning at all. It is time to purge the error and restore some balance in state-federal relations in the management of water resources.

The Court should *not* deny the State of California's claims on the linguistically impermissible ground that Section 8 provides for compensation of property rights only; the Court should *not* hold that a state's regulatory scheme is beyond the protection of Section 8. Instead the Court should perform the admittedly harder but intellectually more honest task of determining whether the Congressional purposes in authorizing the construction and operation of the New Melones Project are frustrated to the extent that, in this case, the Section 8 presumption in favor of state law has been rebutted.

III. A REVIVIFICATION OF SECTION 8 WOULD ALLOW STATE WATER OFFICIALS TO ADMINISTER WATER MORE EFFICIENTLY AND WOULD NOT IMPAIR FEDERAL CONTROL OF FEDERAL PROJECTS.

One of the unfortunate results of the evisceration of Section 8 is to curtail the ability of state water officials to administer water resources efficiently. For example, *amicus* is informed that requests have been received to transfer, inside California, portions of California's allotment of Colorado River water from an existing use to a higher-value use. But uncertainty exists whether that economically efficient reallocation is legally possible. *Arizona v. California* says that federal law controls the transfer. But of course there is no federal law on water transfers; the law is purely state law, almost universally statutory. The buyer and the seller are nonetheless, and understandably, reluctant to incur the high engineering and legal costs to effect the transfer according to state procedures, since the validity of the transfer could be challenged later as beyond the power of the state. A proper interpretation of Section 8 would confer jurisdiction on state authorities to authorize transfers subject to the condition that the Secretary receive notice of the transfer proceeding to allow him to intervene in order to protect federal interests. Any claim that federal interests were jeopardized by the state proceeding could be vindicated by this Court. An exact parallel exists between the protection of federal rights jeopardized by improper interpretations of Section 8 in state proceedings and the protection afforded federal reserved rights in state adjudications by the *Eagle County* case. *United States v. District Court*, 401 U.S. 520 (1971).

Uncertainty also exists about the power of state regulatory officials to impose conservation measures on farmers receiving reclamation project water. If Section 8 merely

allows state law to define compensable property rights in water and if federal law controls project water down to the farmers' furrows, the state may be powerless to require spray irrigation in place of field flooding, to limit the amount of water that can be applied to crops, and to take other actions to save water. The consequence is that a state may be forced to construct additional dams and storage reservoirs to develop new water supplies because it lacks the regulatory power to meet the demand by conserving existing supplies.

None of these misfortunes need occur if the Court will take this occasion to reconsider its pronouncements on Section 8 and return to the historical meaning and the contemporary good sense of the language on its face: "The Secretary . . . shall proceed in conformity with . . . [state] laws relating to the control, appropriation, use, or distribution of water used in irrigation. . . ." —except where state law conflicts with the acomplishment of federal purposes. Conflict should be the issue—not the meaning of Section 8.

CONCLUSION

The general issue properly before the Court is whether the application of state law pursuant to Section 8 frustrates a federal purpose. The specific question is whether the conditions of Decision 1422 are in such conflict with the statutory provisions which authorized construction of the New Melones Project that it is necessary to override state law and Section 8 in order to accomplish the Congressional purpose. If this question is regarded as one of law only, as it was below, the Court can affirm or reverse the summary judgment granted below. If the Court considers that the issue of conflict between federal purposes and the state conditions raises questions of fact, the Court should remand

the case for trial. What the Court should *not* do is to hold that Section 8 is a compensation statute only, making no allowance for application of state law to federal reclamation projects.

Respectfully submitted,

CHARLES J. MEYERS
Stanford Law School
Crown Quadrangle
Stanford, California 94305

(Appendices follow)

Appendix A

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE [LETTERHEAD]
STATE BUILDING, SAN FRANCISCO 94102
(415) 557-2544
(415) 557-3920

January 10, 1978

Michael Rodak, Jr. Clerk
United States Supreme Court
Washington, D.C. 20543

Re: State of California v. United States
No. 77/285.

Dear Mr. Rodak:

The petitioner, State of California, et al, consents to the filing of the amicus brief of Charles J. Meyers.

Yours very truly,

EVELLE J. YOUNGER
Attorney General

/s/ RODERICK E. WALSTON
Roderick E. Walston
Deputy Attorney General

REW/elb

Appendix B

Office of the Solicitor General [Letterhead]
Washington, D.C. 20530

January 5, 1978

Dean Charles J. Meyers
Stanford Law School
Stanford, California 94305

Re: *California v. United States,* No. 77-285,
Supreme Court, October 1977 Term,
certiorari granted December 5, 1977.

Dear Dean Meyers:

This is in response to your request, made by telephone to this office on January 4, 1978, that the United States consent to your filing of a brief *amicus curiae* in the above-cited case.

As I understand it, you propose to file the brief solely on your own behalf, as a scholar in the field of water law who has written extensively on the subject involved in this case and who has an academic and professional interest in the optimum development of the law in this field.

Let me stress that, knowing your reputation and the major scholarly contributions you have made to this subject, I do not question that your proposed *amicus* brief would be of assistance to the Court. If your request were the only one of this kind that could be foreseen, I would not hesitate to grant my consent.

I must, however, decline to do so. Once this office changed its policy to consent to *amicus* filings by persons whose interest in a case was solely academic, it is not clear where we could stop. If we consented automatically to all such

requests, we would abdicate the screening function that the Supreme Court's Rule 42(2) imposes on us, we believe, as a litigant who is frequently asked to consent to *amicus* filings in the Court. But short of that extreme position, we see no feasible and defensible way to distinguish between the "scholarly" requests to which we would consent and those to which we would not. We cannot draw lines on the basis of institutional affiliation, or our own perceptions of a law professor's reputation, or even whether one is a law professor (as distinguished, for example, from a practitioner, a political science professor, or perhaps even a law student), or on the basis of the quality or even the existence of published writings by the applicant relevant to the case in question. In short, we are faced with the problem, well known to law professors, of a "slippery slope."

Perhaps we are being too protective of the Court. But we do read Rule 42(2) as obliging us to screen *amicus* requests and to do so in a rational and even-handed manner. Would-be *amici* who are denied the consent of all parties under Rule 42(2) remain free, of course, to move the Court for leave to file pursuant to Rule 42(3), which requires that the movant set forth, among other things, the nature of his interest in the case. If you make such a motion, we will not object to it. (You may, of course, attach this letter to your motion.)

We welcome instruction from the Court, through its sustained action on such motions, concerning any change it may wish us to make in the standards we apply to *amicus* requests.

Alternatively, if you should seek to file an *amicus* brief in this case on behalf of a client, we would be happy to

reconsider whether to consent to your filing, in the light of the identity of the client and the nature of the client's interest in the case.

I regret that I cannot be more receptive to your request, but I trust that you understand the reasons for our position.

Sincerely,

/s/ WADE H. MCCREE, JR.
Wade H. McCree, Jr.
Solicitor General

Appendix C

Section 8 of the Reclamation Act of 1902:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 32 Stat. 390 (1902); 43 U.S.C. §§ 372, 383 (1970).

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the

Supreme Court

of the

United States

Fall Term, 1977

No. 77-285

THE STATE OF CALIFORNIA, et al.
Petitioners,

vs.

THE UNITED STATES of AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FRIANT WATER USERS ASSOCIATION, CENTRAL VALLEY EAST SIDE PROJECT ASSOCIATION, ASSOCIATION OF CALIFORNIA WATER AGENCIES, COUNTY OF TULARE, AND WESTLANDS WATER DISTRICT AS AMICI CURIAE

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INTRODUCTION

This Amici Curiae Brief is submitted on behalf of the Friant Water Users Association, Central Valley East Side Project Association, Association of California Water Agencies, County of Tulare, and Westlands Water District, in support of the Respondent United States of America.

Friant Water Users Association is an unincorporated Association, the members of which are 22 public districts situated in the San Joaquin Valley in the counties of Madera, Fresno, Tulare, and Kern. Each of the member districts is a political subdivision of the State of California, empowered by law to acquire water within the State for sale and distribution to the landowners within its boundaries, and has executed a contract with the United States Department of the Interior, Bureau of Reclamation, to purchase water from the Friant Division of the Central Valley Project. The member districts comprise a total of 1,380,254 acres within the San Joaquin Valley, and their contracts with the United States Department of the Interior, Bureau of Reclamation, are for the purchase of water totaling 2,202,800 acre feet annually. The water delivered to the member districts under these contracts is essential to meet the water needs of their respective areas, and to sustain the agricultural economy of the area within their boundaries.

Central Valley East Side Project Association is a corporation organized and existing under the laws of the State of California. The members of the Central Valley East Side Project Association are individuals, private corporations and associations, county governments, municipal governments, public districts, and other political subdivisions of the State of California situated in the San Joaquin Valley in the counties of Sacramento, San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare, Kings, and Kern. The association was formed and exists for the purpose of representing and expressing the common interest of its members in furthering the authorization and construction of the proposed East Side Division and the proposed Mid Valley Canal of the federal Central Valley Project. Each member is either a private individual or entity having an interest in, or governmental agency having responsibility for, the water needs of an area of the San Joaquin Valley that is within the service area of the proposed East Side Division and Mid Valley Canal, and that is in need of, and would be benefited by, the opportunity to purchase a supplemental water supply from the federal Central Valley Project.

The Association of California Water Agencies (formerly the Irrigation Districts Association), is a nonprofit California corporation whose members comprise most of the local public agencies in the State engaged in developing and purveying water for agricultural, domestic, and municipal uses. The members of the Association include 258 public water agencies serving irrigation water to approximately 7,000,000 acres of land, and providing water service to nearly 80 percent of the State's population. Of these members, 44 members have contracts with the United States Department of the Interior, Bureau of Reclamation, for water service from the federal Central Valley Project, and serve that water to a total of 3,062,191 acres within

the great central valley of California.

The County of Tulare is a political subdivision of the State of California. Within the County there are many public districts having contracts with the United States Department of the Interior, Bureau of Reclamation for water service from the Friant Division of the federal Central Valley Project, and many more public districts and cities that have applied to the Bureau of Reclamation for water service from the proposed Mid Valley Canal facilities of the Central Valley Project. Within the County of Tulare there is a present and existing overdraft of the groundwater reservoirs which will lead to serious and drastic shortages of water necessary to supply the present and future demands for water within the County for domestic, industrial and irrigation uses.

Westlands Water District is a political subdivision of the State of California, situated in western Fresno and Kings Counties, encompassing an area of approximately 600,000 acres. The District is empowered by law to acquire water within the State for sale and distribution to landowners within its boundaries, and pursuant to this authority has executed a permanent contract with the United States Department of the Interior, Bureau of Reclamation, to purchase water from the San Luis unit of the federal Central Valley Project in the amount of 1,008,000 acre feet annually. The water to be delivered to the District under this contract is essential to meet the water needs of the service area, and to sustain the agricultural economy of the area within the boundaries of the District.

STATEMENT OF THE CASE AND THE INTEREST OF AMICI CURIAE

The Petitioner State Water Resources Control Board of the State of California is a public agency of the State of California, duly created by the legislature pursuant to the provisions of Article III, Chapter 2, Division 1 (Section 174 et seq.) of the California Water Code. The Petitioner Board is the successor to the duties and liabilities of the State Water Rights Board (California Water Code Section 179).

The California Department of Water Resources, as operator of the California State Water Resources Development System, and the United States Bureau of Reclamation, as operator of the federal Central Valley Project, filed 39 applications with the State Water Rights Board to divert from the water supply of the Sacramento-San Joaquin Delta, pursuant to Divisions 2 and 6 of the California Water Code. Decision D-893, dated March 18, 1958, D-990, dated February 9, 1961, D-1020, dated June 30, 1961, and D-1250, dated June 1, 1966, of the State Water Rights Board, and Decisions D-1308, dated July 18, 1968, and D-1356, dated February 5, 1970, of the Petitioner Board, granted water permits pursuant to these applications to the United States Bureau of Reclamation, with certain limited reservations of jurisdiction. The permits granted to the United States Bureau of Reclamation represent water rights established under Division 2 of the California Water Code essential to the ability of the Bureau of Reclamation to fulfill its contractual commitment to deliver water to the public water agencies with whom it has existing contracts, and essential

to the ability of the Bureau of Reclamation to fulfill its intention to deliver water to prospective contractors who have applied to it for a water supply through the facilities of the proposed East Side Division and the proposed Mid Valley Canal of the federal Central Valley Project.

Pursuant to the reservation of jurisdiction referred to above, and Article III, Division 1, Chapter 2 of the California Water Code, the Petitioner Board reopened public hearings to determine what modifications, if any, should be made to existing state and federal water permits. Hearings in the matter of Application 5626 and 38 other applications to appropriate from the Sacramento-San Joaquin Delta water supply commenced on July 22, 1969, and continued for 94 actual hearing days. The Central Valley East Side Project Association, Friant Water Users Association, Westlands Water District, and County of Tulare appeared in these proceedings and presented testimony and exhibits in support of the United States water permits.

On July 28, 1971, the Petitioner Board issued Decision 1379. Decision 1379, as modified by the Petitioner Board's Order of September 16, 1971, purported to impose new permit terms and conditions upon the existing United States water permits that would:

1. Require the Bureau of Reclamation to maintain, either by a discontinuation of direct diversion at the project pumps or by release of natural flow or water in storage, water quality in the channels of the Delta, equal to or better than those enumerated in the State Delta Standards. ("State Delta Standards" are then set forth in the Decision, constituting specifications of

water quality and water quantity at designated geographical stations for each period of each year for the protection of agricultural uses, industrial and municipal uses and fish and wildlife.)

2. Require the Bureau of Reclamation to make such releases of project water without any provision for compensation.

3. Require the Bureau of Reclamation to install and operate water quality monitoring stations in the Delta and make certain studies of conditions in the Delta as prescribed by the Petitioner Board.

4. Require the United States Bureau of Reclamation to operate the federal Central Valley Project in full coordination with the State Water Project.

5. Require the United States Bureau of Reclamation to restrict its diversions or to release water from storage to maintain standards of water quality within the Delta for the protection of fish and wildlife.

6. Reserve jurisdication to the Petitioner Board over the United States water permits for an additional indeterminate period of time for the purpose of modifying the permit terms and conditions imposed by the Decision, or imposing new and additional permit terms and conditions.

After all petitions for reconsideration, objections to, and clarification of, Decision 1379 were denied by the Petitioner Board, the Friant Water Users Association, Central Valley East Side Project Association, County of Tulare, Westlands Water District, and others filed a Petition for Writ of Mandate in the Superior Court of the State of California for the County of Sacramento, seeking judicial review of the Petitioner Board's Deci-

sion 1379 under the appropriate provisions of California Law. The Petition for Writ of Mandate alleges and contends that in purporting to impose these terms and conditions on the United States water permits, the Petitioner Board had:

1. Proceeded without jurisdiction and in excess of jurisdiction.

2. Ignored and disregarded the legislation by the Congress of the United States in authorizing the federal Central Valley Project.

3. Failed to comply with applicable state and federal law.

4. Not proceeded in the manner required by law.

5. Ignored and disregarded the provisions of Article XIV, Section 3, of the Constitution of the State of California, and Sections 106, 1254 and 10,500 of the California Water Code. The United States Department of the Interior, Bureau of Reclamation, was named as Real Party in Interest in the Petition.

A Petition for Writ of Mandate seeking judicial review of the Petitioner Board's Decision 1379, was also filed in the same court by several water agencies having contracts for water service from the California State Water Project. The Contra Costa County Water Agency, which had been allowed to intervene in the cases, filed a Cross-Complaint against the United States Bureau of Reclamation and the California Department of Water Resources, and the two cases were thereupon transferred to the United States District Court for the Eastern District of California and docketed as *Central Valley East Side Project Association* vs. *the State Water Resources Control Board* (Civ. S-2582)

and *Kern County Water Agency* vs. *State Water Resources Control Board* (Civ. S-2583).

In 1972 the Petitioner Board rendered its Decision 1400 imposing numerous terms and conditions on the water permits previously issued to the United States for diversion of water from the American River for use in the federal Central Valley Project. A Petition for Writ of Mandate to obtain a judicial review of that Decision was filed by the San Joaquin County Flood Control and Water Conservation District in the Superior Court of the State of California for the County of Placer. The Petition in that action challenged Decision 1400 on jurisdictional grounds that were substantially the same as those urged by the Amici Curiae in their challenge to Decision 1379. The Friant Water Users Association and Central Valley East Side Project Association were allowed to intervene in that action in support of the petitioners. That action was also removed to the United States District Court for the Eastern District of California and docketed as *San Joaquin County Flood Control and Water Conservation District* vs. *the State Water Resources Control Board* (Civ. S-2730).

After the filing of the instant case, *United States of America* vs. *The State of California* (S-3014), in the same court, that court, by order dated July 8, 1974, stayed all action, except for discovery, in proceedings Civ. S-2582, Civ. S-2583, and Civ. S-2730 pending a decision in the instant case. The petitioners in the stayed actions, including these Amici Curiae, were granted Amicus Curiae status in *United States of America* vs. *The State of California* (Civ. S-3014), and

as such they participated at all stages of the proceedings in the District Court.

Final resolution of the central federal-state jurisdictional issue in the instant case regarding Decision 1422 will be determinative of that same issue raised in the challenges to Decisions 1379 and 1400 of the Petitioner Board. Consequently, the final determination of the instant case will have a direct and significant effect on all federal water service contractors in California, as it will determine the integrity of their intended water supply from not only the New Melones project, but from all other features of the federal Central Valley Project as well.

SUMMARY OF ARGUMENT

I

Section 8 of the Reclamation Act of 1902 only requires the United States to recognize state water rights when it is acquiring water to operate a congressionally authorized project, and preempts the application of state law except for the definition of the property rights acquired. The state cannot compel the use of federal property on terms other than those prescribed or authorized by Congress. Section 8 recognizes private water rights established pursuant to state law; it does not give to the state any control over the operation of the federal project nor any power to direct that the project be operated for purposes and objectives other than those expressly authorized by Congress.

II

The Supreme Court of the State of California has

adopted a somewhat more limited view of the preemption, but acknowledges that the Reclamation Act preempts the application of state law (1) when state law conflicts with federal law, and (2) when a danger exists that the application of state law would either interfere with the Secretary's expressly delegated powers, frustrate operation of the project, or limit the benefits of the project.

III

When the United States applies to the Petitioner Board for the water right permit necessary to the project, there is no need for the Board to have the power to impose terms and conditions on that permit in order for the state to be fully informed and involved in the appropriation process. The extensive requirements for the contents of the application itself assures California full information and involvement. If a permit is issued pursuant to the application, it is sharply defined in terms of place of diversion, times of diversion, quantity of diversion, place of use, and purpose of use, all in conformity with the provisions of the application, and the United States must adhere strictly to those provisions.

IV

Whether the Reclamation Act preempts the application of state law except for the definition of the property rights acquired, as we believe, or that preemption is somewhat more limited as in the view of the California Supreme Court, the result is the same in

this case. The permit terms and conditions imposed by the Petitioner Board in Decisions 1379 and 1422 are clear demonstrations that if the State Board is allowed to impose any terms and conditions whatsoever on the permit granted to the United States, there is a real danger of interference with the Secretary's expressly delegated powers to contract for the benefits from the project, frustration of the project operation, and reduction of project benefits.

I

SECTION 8 OF THE RECLAMATION ACT OF 1902 PREEMPTS THE APPLICATION OF STATE LAW EXCEPT FOR THE DEFINITION OF PROPERTY RIGHTS ACQUIRED.

The entities on whose behalf this amicus brief is filed strongly support the position of the United States that Section 8 of the Reclamation Act of 1902 only requires the United States to recognize State law in the acquisition of unappropriated water to operate federally authorized projects. As stated again and again in decisions of this court, the United States is only required by Section 8 to recognize state water rights when it is acquiring water to operate a Congressionally authorized project. It is not reasonable to have Congress authorize a project based on certain feasibility findings and for certain purposes, and then allow a state, at some later point in time, to require that the water be used for some purposes contrary to the purposes authorized and directed by Congress.

This issue was laid to rest years ago. Perhaps not the first time, but at least one of the earliest times this

Court addressed the sole issue was in *Ivanhoe Irrigation District* vs. *McCracken* (1955) 357 U.S. 275; 78 S. Ct. 1174; 2 Law Ed. 2d 1313. The Attorney General of California argues that this case only holds that unless you have a specific inconsistent federal law that the State law prevails. This is not the case. In *Ivanhoe, supra*, and later cases, this theory has no support.

In order to properly understand *Ivanhoe, supra*, it is necessary to read and understand *Ivanhoe Irrigation District* vs. *All Parties*, (1957) 47 Cal. 2d 597, 306 Pac. 2d 824, before the United States Supreme Court decision, and *Ivanhoe Irrigation District* vs. *All Parties*, (1960) 53 Cal. 2d 692; 3 Cal. Rptr. 317; 350 Pac. 2d 69, after the United States Supreme Court decision.

In the first *Ivanhoe* case, 47 Cal. 2d 597, the California Supreme Court construed Section 8 of the Reclamation Act of 1902, so as to require the United States to recognize and comply with State law in operating the Central Valley Project, just as the Attorney General now contends the United States is bound. The acreage limitation was not the only issue and the California Supreme Court decided any number of other issues in which the United States would have to yield to the existing State laws. This is shown most clearly by the conclusions reached by the California Supreme Court at Page 647 of the Opinion, where the Court said:

> "In accordance with the foregoing it is concluded:
> (1) That the plaintiff is an irrigation district duly organized, existing and operating as such under the laws of this state.
> (2) That the title to the unappropriated

domestic waters of the state is in the State of California in trust for the water users of the state as beneficiaries and such waters are subject to appropriation under the laws of the state.

(3) That the United States as assignee of appropriative rights, as original appropriator thereof, and in the acquisition of other rights for the same purpose stands in the same relation to such beneficial owners as does the state, namely, as trustee for such beneficial owners and is answerable for the faithful performance of that trust.

(4) That in distributing the water contracted to be delivered to the District the United States does so as a purveyor of water at a price for the benefit of the water users of the District.

(5) That in so delivering the water to the District, it is not competent for the United States or the District, either or both, to discriminate against the present or potential water users in the District on the basis of the amount of land owned by them, and that the 160-acre limitation contained in the original Reclamation Act is inapplicable to the subject matter of the contract and is improperly contained therein.

(6) That insofar as the contract provides for the construction of works for the storage and distribution of water to and by the district, the relationship of the parties is that of constructor and contractee. Upon the completion of the construction work the district is obligated under the law to pay for the same within 40 years in equal annual installments. Upon the completion of such payments the district is entitled to ownership of the works and property of the storage and distribution system free from any claims of the United States.

(7) That insofar as the contract provides for

furnishing water to the district at a price the United States in acting as a purveyor of domestic waters of the state to the district, under federal law, is bound to observe and comply with the laws of the state with reference to the rights which are vested in the water users being served or entitled to be served. In this respect neither the state nor any of its agencies may contract or otherwise provide that the distribution of water to those for whose benefit the right to the water was acquired may be arbitrarily discontinued.

The judgment is affirmed."

After the United States Supreme Court decided *Ivanhoe*, 357 U.S. 275, the case went back to the California Supreme Court for the decision in 53 Cal. 2d 692. The California Supreme Court of course abandoned any effort to impose state law on the United States. Not on the acreage limitation issue alone, but also on the many other issues involving state law. At Page 704 of the second *Ivanhoe* Opinion by the California Supreme Court, the Court said this:

> "The problem left for determination on the issue of the validity of the contracts is thus now quite simple. The federal government with federal funds has lawfully developed water — project water — that without the project would not have been developed. The United States and the State of California have provided by appropriate legislation for entering into contracts regarding this water, and have provided certain limitations on its use, so that the water thus developed will reach the ultimate user subject to those conditions. This water belongs to or by appropriate action may be secured by the United States. In a very real sense it is or will become the property of the United States.

As was stated by the United States Supreme Court (*Ivanhoe Irr. Dist.* v. *McCracken*, 357 U.S. at p. 295):

'Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. (Citing cases.) The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to the federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. (Citing cases.) Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislation action' "

At Page 708 of the same Opinion, the California Supreme Court held:

"The holding of this court that section 8 of the Reclamation Act made state law applicable to these contracts, was directly reversed by the United States Supreme Court. The high court stated: 'The opinion of the Supreme Court of California turned on an interpretation of . . . § 8 of the Reclamation Act of 1902. That section provides that the Act is not to be construed as interfering with state laws 'relating to the control, appropriation, use, or distribution of water used in irrigation.' It further provides that in administering the Act the Secretary of the Interior 'shall proceed in conformity with such laws. . .' The California court held that this provision required the application of California law, and finding the provisions of the contracts contrary thereto, it refused confirmation.' (357 U.S. at 278.) And again: 'In effect, the (California) court held that this section (§ 8) overrides all other sections of the Act, requiring that it be construed

as not affecting state laws 'relating to the control, appropriation, use, or distribution of water used in irrigation.' Turning to state law, the court by applying a 'trust theory' held that the Federal Government could acquire no title to appropriate water rights free of a trust in the State of California for the benefit of the people of the State. This 'limited measure of control' of the appropriative water, the court said, 47 Cal. 2d, at 620. . . , prevented the imposition of the 160-acre limitation because the beneficiaries of the trust, namely, the people of the State and particularly those in the districts involved, would be deprived by the acreage limitation of a right to the use of the water in the district. We think it plain that this was a construction of federal law and not a holding of unconstitutionality.' (357 U.S. at 289.)

The United States Supreme Court then held that this court's construction of section 8 of the Reclamation Act was erroneous. 'As we read § 8 it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operations of federal projects. As the court said in *Nebraska* v. *Wyoming*, *supra*, (325 U.S. 589 (65 S. Ct. 1332, 89 L. Ed. 1815)) at 615: 'We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system.' Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects, providing that '(n)o right to the use of water . . . shall be sold for a tract exceeding one hundred and sixty acres to any one landowner . . .' We read nothing in § 8 that compels the United States to

deliver water on conditions imposed by the State. To read § 8 to the contrary would require the Secretary (of Interior) to violate § 5, the provisions of which, as we shall see, have been national policy for over half a century.' (357 U.S. at 291.)"

And at Page 713 of the Opinion, the California Supreme Court said this:

"The following statements of the United States Supreme Court are here pertinent:

'There can be no doubt of the Federal Government's general authority to establish and execute the Central Valley and Santa Barbara County projects. As we said in *United States* v. *Gerlach Live Stock Co.*, *supra* (339 U..S. 725 (70 S. Ct. 955, 94 L. Ed. 1231, 20 A.L. R.2d 633)), at 739, the Congress 'elected to treat it (the Central Valley Project) as a reclamation project.' We upheld its power to pursue the project as 'clear' and 'ample', an exercise of the general power 'to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement.' *Id.*, (339 U.S.) at 738... In developing these projects the United States is expending federal funds and acquiring federal property for a valid public and *national purpose*, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, § 8, of the Constitution, but also from Art. IV, § 3, relating to the management and disposal of federal property. As this Court said in *United States* v. *San Francisco*, 310 U.S. 16, 19-30 (60 S. Ct. 749, 84 L. Ed. 1050) (1940), this 'power over the public land thus entrusted to Congress is without limitations.' 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'" (Citations)" (357 U.S. at 294 (emphasis added).)

With regard to the power of Congress to

regulate the use of federal funds, the court used language worth repeating: 'Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. (Citing cases.) The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. (Citing a case.) *Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action.*' (357 U.S. at 295 (emphasis added).)"

If anyone had any doubt as to what *Ivanhoe*, 357 U.S. 265 meant after reading *Ivanhoe*, 53 Cal. 2d 692, Mr. Justice Clark took care of that in *Fresno* vs. *California*, (1963) 372 U.S. 627; 83 S. Ct. 996; 10 L. ed. 2d 28, where he explained again the scope of Section 8 of the Reclamation Law of 1902 at Page 30 of the Decision where he said:

"We agree entirely with the disposition of the Court of Appeals. Petitioner seems to say that § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 USC § 383, requires compliance with California statutes relating to preferential rights of counties and watersheds of origin

*(372 US 630)

and to the *priority of domestic over irrigation uses. However, § 8 does

Headnote 2 not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. This was settled in *Ivanhoe Irrig. Dist.* v.

McCracken, 357 US 275, 2 L ed 2d 1313, 78 S. Ct. 1174 1958). Rather, the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made."

Later in 1963, after the *Fresno* case, supra, the United States Supreme Court again explained *Ivanhoe*, *supra*, in *Arizona* vs. *California*, 1963, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542, where at Page 570, the Court stated:

"The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this Court in *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 US 275, 2 L ed 2d 1313, 78 S.Ct. 1174 (1958), and reaffirmed in *Fresno* v. *California*, 372 US 627, 10 L ed 2d 28, 83 S.Ct. 996 (1963). In *Ivanhoe* we held that, even though § 8 of the Reclamation Act preserved state law, that general provision could not override a specific provision of the same Act prohibiting a single landowner from getting water for more than 160 acres. We said:

Headnote 26

'As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska* v. *Wyoming*, *supra*, at 615: 'We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system. '. . .We read nothing in § 8 that compels the

Headnote 27

United States to deliver water on conditions imposed by the State.' Id. 357 US at 291, 292.

*(373 US 587)

*Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with *Ivanhoe*, hold that the Secretary must be bound by state law in disposing of water under the Project Act."

It would seem that this Court clearly held in *Arizona* vs. *California*, 373 U.S. 546, *supra*, that Section 8 of the 1902 Act does not give states control over operation of federal reclamation projects. While Section 8 recognizes private water rights established pursuant to state law, the Secretary of the Interior is not bound to any state formula in operating reclamation projects. When in the operation of a federal reclamation project, operation and management choices are to be made, it is the Secretary who makes the decisions.

The Ninth Circuit said much the same in *Turner* vs. *Kings River Conservation District*, 360 F. 2d 184, 197 *et seq*. (1966). *Turner* says that states cannot control federal methods of acquisition or operation of reclamation projects. The Court said further (at 198):

"We must agree with the government that reason precludes an interpretation of the general provisions of Section 8 of the Reclamation Act [of 1902] and Sections 1 and 8 of the Flood Control Act [of 1944] which would impute to Congress an intention to frustrate its plans for this project by subjecting it to the risk that it might never be used for some of the authorized purposes should a state permit not be forthcoming."

The principle applied in these cases is supported by

two recent decisions of the Court involving other federal statutes. We refer to *Hancock* vs. *Train*, 1976, 426 U.S. 167, interpreting Section 118 of the Clean Air Act, 42 U.S.C. 1857F, and *Environmental Protection Agency* vs. *California ex rel., State Water Resources Control Board*, 1976, 426 U.S. 200, interpreting Section 313 of the Water Pollution control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. 1323. In the *E.P.A.* vs. *California* decision, the Court said:

> "Our decision in this case is governed by the same fundamental principles applied today in *Hancock* vs. *Train*, ante, at 179: Federal installations are subject to state regulation only when and to the extent that Congressional authorization is clear and unambiguous. Id. at 211."

II

AT THE LEAST, THE RECLAMATION ACT PREEMPTS THE APPLICATION OF STATE LAW WHEN STATE LAW CONFLICTS WITH FEDERAL LAW, AND WHEN THERE IS DANGER OF INTERFERENCE WITH EXPRESSLY DELEGATED POWERS, FRUSTRATION OF PROJECT OPERATION, OR LIMITATION OF PROJECT BENEFITS.

If the decisions of this Court interpreting Section 8 do not stand for the proposition that that Section of the Reclamation Act of 1902 preempts the application of state law beyond a definition of the property interest to be acquired, they, at very least, stand for the proposition that the Reclamation Act preempts the application of state law (1) when state law conflicts with Federal Law, and (2) when a danger exists that the application of state law would either interfere with the Secretary's expressly delegated powers, frustrate operation of the project, or limit the benefits of the project. In a case involving a contract between the East Bay Municipal Utility District and the United States for water service from the Auburn-Folsom South Unit of the Federal Central Valley Project, the Supreme Court of the State of California, in a most recent decision, has so interpreted these decisions of the Court. (*Environmental Defense Fund, Inc.*, v. *East Bay Municipal Utility District*, 20 Cal. 3rd 327, filed Dec. 20, 1977). After consideration of this Court's decisions in *Ivanhoe*, *Fresno*, and *Arizona*, the Court states (20 Cal. 3rd 327, 338):

> "The Court held that Congress preempts state laws not only when direct conflict exists, but also when danger exists in that state law either interferes with the Secretary's expressly delegated powers, frustrates operation of the project, or limits the benefits of the project."

As confirming the *Arizona* construction of Section 8, the California Court cites two earlier decisions of this Court dealing with statutes similar to Section 8: First *Iowa Hydro-Elec. Coop.* v. *Federal Pow. Com.* (1945) 328 U.S. 152, dealing with Section 27 (16 U.S.C. 821) of the Federal Power Act (16 U.S.C. 802(b)), and *Rice* v. *Board of Trade* (1946) 331 U.S. 247, dealing with Section 4c of the Commodity Exchange Act (7 U.S.C. 1 et. seq.).

III

THE CALIFORNIA APPLICATION AND PERMIT PROCEDURE ASSURES THE STATE FULL INFORMATION AND INVOLVEMENT.

It is the judgment of the court below that the United States of America can appropriate unappropriated water necessary for use in any federal Reclamation project within the State of California, but must first apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water; that the Board must grant such applications if unappropriated waters are available; and that it is beyond the power of the Board to impose any terms or conditions in permits issued to the United States of America as a result of applications to the Board by the United States for allocation of unappropriated water.

The Petitioner contends that without the power to impose terms and conditions on the permit, the state would not know where the water was to be used or for what purpose. There is no substance to this contention. California has most extensive requirements for the contents of the application itself. Article II, Chapter 2, Part 2, Division 2 of the California Water Code, "Contents of Applications" contains the following provisions:

"Section 1260. REQUIRED CONTENTS

Every application for a permit to appropriate water shall set forth all of the following:

(a) The name and post office address of the applicant.
(b) The source of water supply.
(c) The nature and amount of the proposed use.
(d) The location and description of the proposed headworks, ditch, canal, and other works.
(e) The proposed place of diversion.

(f) The place where it is intended to use the water.
(g) The time within which it is proposed to begin construction.
(h) The time required for completion of the construction.
(i) The time for the complete application of the water to the proposed use.
(j) All data and information reasonably available to applicant or that can be obtained from the Department of Fish and Game concerning the extent, if any, to which fish and wildlife would be affected by the appropriation, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the appropriation.

Section 1261. MAPS, DRAWINGS, AND OTHER DATA

All applications shall be accompanied by as many copies of such maps, drawings, and other data as may be prescribed or required by the board, and such maps, drawings and other data are part of the application.

Section 1262. AGRICULTURAL PURPOSES

If for agricultural purposes the application shall give the legal subdivisions of the land and the acreage to be irrigated, as near as may be.

Section 1263. POWER PURPOSES

If for power purposes the application shall state the nature of the works by means of which the power is to be developed, the head and amount of water to be utilized, and the use to which the power is to be applied.

Section 1264. MUNICIPAL WATER SUPPLY

If for municipal water supply the application

shall state the present population to be served, and, as near as may be, the future requirements of the city.

Section 1265. MINING PURPOSES

If for mining purposes the application shall state the nature and location of the mines to be served and the methods of supplying and utilizing the water.

Section 1266. STORAGE IN RESERVOIR

If for storage in a reservoir the application shall state the height of dam, the capacity of reservoir, and the use to be made of the impounded waters, except that for storage underground these additional requirements as to height of dam and capacity of reservoir shall be given as near as may be."

If the Board finds that there are unappropriated waters available to satisfy the application, the water rights permit issued by the Board is sharply defined in terms of place of diversion, times of diversions, quantity of diversions, place of use, and purpose of use, all in conformity with the provisions of the application. In the exercise of the water right acquired, the United States must adhere strictly to the provisions of the permit. Certainty and full knowledge is thus assured to both California and the United States.

IV

IF THE STATE BOARD IS ALLOWED TO IMPOSE ANY TERMS AND CONDITIONS ON THE PERMIT GRANTED TO THE UNITED STATES, THERE IS REAL DANGER OF INTERFERENCE WITH THE SECRETARY'S EXPRESSLY DELEGATED POWERS, FRUSTRATION OF THE PROJECT OPERATION, AND REDUCTION OF PROJECT BENEFITS.

If the State Board is allowed to impose any terms or conditions beyond the express provisions of the permit, in conformity with the application, there is a very real danger that those terms and conditions will interfere with the Secretary's expressly delegated power to contract for the reimbursable benefits from the project, will frustrate the operation of the project, and will limit and reduce the project benefits available for those uses and purposes for which the project was expressly authorized by Congress.

Petitioners argue that the permit terms and conditions imposed by the Petitioner Board in Decision 1422 did not seek to control the use of water from the New Melones Project, and were not inconsistent with the purposes of that Project. The restrictions imposed by the permit terms and conditions are summarized by the District Court (R.1044-1045) as follows:

> (1) Conditions relating to impoundment — Conditions 1 and 2 defer full impoundment of all waters sought by the Bureau until such time as the Bureau is able to demonstrate a plan or a firm commitment for the use of project water.
>
> (2) Conditions relating to reservation of jurisdiction — Conditions 6, 9, 13, 20, and 22 reserve jurisdiction to the Board to impose further conditions on the Bureau to protect the "beneficial use" of water involved.
>
> (3) Conditions relating to reporting requirements — Conditions 3, 7, 8, 12 and 21 impose requirements of further or continuing study or the filing of specified reports.
>
> (4) Conditions limiting or controlling the use of water — Conditions 4, 5, 14, 19, 23, 24, and 25 place various limits or controls on the use of water to or from the project.

(5) Conditions relating to time — Conditions 10 and 11 impose various time constraints on completion of the project and application of water.

(6) Conditions relating to accessability — Conditions 15 and 16 discuss the access to be afforded to representatives of the Board and members of the public.

(7) Conditions imposing mandatory requirements — Condition 17 imposes the requirement on the Bureau to install an outlet pipe "as near as practicable to the bottom of the natural stream channel"; condition 18 requires the Bureau to clear vegetation and structures from the side of the reservoir in accordance with California Water Code provisions.

We submit that on their face these restrictions would interfere with the Secretary's expressly delegated power to contract for the water from the project, would interfere with the operation of the project as authorized, would limit and reduce the benefits of the project available to those uses and purposes for which it was authorized, and would impose upon the United States the financial burden of performing acts and constructing works not contemplated by the authorizing legislation.

Assuming, arguendo, that the terms and conditions imposed in Decision 1422 were *not* inconsistent with the purposes of that project, and would *not* interfere with its operation, this is entirely beside the point. The important point is not what the Petitioner Board *did* in Decision 1422, but rather what the Board *might do*, or has in other decisions *attempted to do*, if it is once conceded the power to impose terms and conditions on

the permit beyond the strict limiting provisions of the application itself.

A perfect demonstration of the real danger that exists if this power is once conceded to the Board, is what the Petitioner Board purported to do in Decision 1379. This is the decision challenged by these Amici Curiae in *Central Valley East Side Valley Project Association* vs. *The State Water Resources Control Board* (Civ. S-2582), the companion case stayed by the District Court pending a decision in the instant case. In the hearing leading to that decision the Petitioner Board had before it all of the water right permits that the Board and its predecessors in function had previously granted to the United States Bureau of Reclamation in support of the Federal Central Valley Project. The new and additional terms and conditions that Decision 1379 purported to impose on those water right permits are summarized in the portion of this Brief entitled "Statement of the Case and the Interest of Amici Curiae" (6, 7). With no provision for reimbursement to the United States, and no regard for the integrity of the power and water service contracts that the Secretary had previously entered into pursuant to the authorizing legislation and the water right permits that had been granted to the United States, these terms and conditions purported to impose upon the United States the obligation to provide an unlimited quantity of water from the project to maintain specified water quality standards throughout the Sacramento-San Joaquin Delta for the protection *and enhancement* of agricultural uses, industrial and municipal uses, fish and wildlife, and the general en-

vironment. A compliance with such provisions would require the Secretary to divert a significant portion of the project water supply benefits from the reimbursable uses and purposes authorized by Congress, to the unauthorized Delta uses preferred by the Petitioner Board. All without regard for either the financial integrity of the project or the circumstances of the water service contractors that for more than 25 years had relied upon, and paid for, the project water supply. Further, the restrictions purported to directly interfere with the operation of the project by requiring the United States to operate the project in full physical coordination with the California State Water Project, a proposition never considered or authorized by the Congress. Further, there was imposed on the United States the financial burden of installing works and conducting studies in the Delta, not provided for in the authorizing legislation. And finally, as in Decision 1422, the Petitioner Board purported to reserve jurisdiction to itself for an indeterminate period of time for the purpose of modifying their restrictions or imposing additional terms and conditions. How can it be seriously contended by anyone that in enacting Section 8 of the Reclamation Act, the Congress intended or contemplated that a water project authorized and constructed by the United States pursuant to the Act, would be forever subject to the uncertainty of having its purposes and objectives changed, without regard for the financial feasibility of the project, in order to comply with conditions that the Petitioner Board, from time to time, might see fit to impose.

The planning, formulating and authorizing of a federal water project is a very long and complicated process, usually taking several years. There are extended feasibility studies considering the constant alternatives, the water supplies available, the water needs and payment capacity of the intended project beneficiaries, the balance of different purposes and objectives of the project and many other factors. Throughout this study there is both local area and state involvement. When the plan is finalized in a form that can be recommended, it is subject to the test of committee hearings and examined by both the House and Senate. In this latter process, it is virtually impossible to obtain Congressional authorization without the strong recommendation and support of the state involved. The authorization of every feature of the federal Central Valley Project, including the New Melones project, has followed this course and has the strong recommendation and support of the State of California, with the state authority representative, the California Water Commission, appearing and testifying before the Congressional Committee. In finally authorizing the project, the Congress has very specific purposes and objectives in mind. We do not believe that it is reasonable to suppose that in adopting Section 8, Congress intended that at the conclusion of this long and involved authorization process there would remain vested in a state administration board the power to change the project to conform to the board's concept of what geographical area should receive the project water, what purposes and objectives should be served by the project, what the allocation between reimbursable and nonreimbursable benefits should be,

and how the project should be operated. This is the power that the Petitioner Board contends for.

It appears to us that the posture of the State of California in this matter is both inconsistent and self-defeating. The Reclamation Act expressly authorizes and directs the Secretary to acquire the property necessary for the project. California wants the United States to continue its practice of acquiring the necessary water rights through the application and permit procedure so that the state can be informed and involved. And yet California contends for the power to give the United States no more than a temporary water right permit, reserving to itself the right to modify that permit in any manner that it wishes at any time in the future. If California is successful in this contention, and if there are to be any federal water projects in California, then the Secretary will be forced to abandon the practice of acquiring the water rights through the application and permit procedure and resort to acquisition by condemnation and purchase in order to comply with his directive from the Congress to acquire the full and permanent water rights necessary to insure the feasibility of the project.

CONCLUSION

The only reasonable interpretation of Section 8 of the Reclamation Act of 1902 is the interpretation enunciated by this Court in *Ivanhoe*, *Fresno*, and *Arizona*, and by the 9th Circuit in *Turner*. In directing the Secretary to proceed in conformity with state law, the Congress intended that the United States should

be required to recognize state water rights when it is acquiring water to operate a congressionally authorized project, but that the use of that federal project be subject to no terms or conditions other than those prescribed or authorized by Congress. The section does not give to the state any control over the operation of the federal project nor any power to direct that the project be operated for purposes and objectives other than those expressly authorized by Congress. It is clearly demonstrated by the permit terms and conditions of Decisions 1379 and 1422 that by contending that it has the power to impose terms and conditions on the water right permit issued to the United States, the Petitioner Board means that it has the power (1) to require the Secretary to take project water away from a geographical area and purpose of use for which it was expressly authorized and deliver it to another geographical area for an entirely different unauthorized purpose, (2) to require the Secretary to take project water away from benefits that were declared by Congress to be reimbursable and for which the Secretary was directed to execute water service contracts, and use that water for different benefits for which there is no provision for reimbursement to the United States, (3) to require the Secretary to operate the federal project in full physical coordination with the project operated by the California Department of Water Resources, (4) to require the Secretary to install works and conduct studies not authorized by Congress, (5) to grant to the United States no more than a temporary water right permit, reserving to itself the right to modify that permit in any manner that it wishes at any

time in the future. It cannot be contended reasonably that in adopting Section 8 of the Reclamation Act of 1902 the Congress intended to give to the states any such blank check as this to completely restructure a federal water project. Congress certainly did not intend that after all of the deliberations and considerations involved in the legislative process of objectives of that project and the provisions assuring financial integrity would be subject to whatever changes and modifications the Petitioner Board might see fit to direct.

For the foregoing reasons your amici respectfully request that the judgment of the Ninth Circuit be affirmed.

DATED: January 19, 1978

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In the Supreme Court of the United States

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Respondent.

On Writ of Certiorari to the
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Motion of Environmental Defense Fund, Natural Resources Defense Council, Inc., and Sierra Club to File Brief Amici Curiae and Amici Curiae Brief

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and

Amici Curiae Brief

Pursuant to Rule 42(3) of the Rules of this Court, the Environmental Defense Fund, Natural Resources Defense Council, Inc., and Sierra Club respectfully move the Court for leave to file the attached brief *amici curiae* in support of the petitioners in the above entitled case. Both counsel for the petitioners and counsel for the respondent

have consented to the filing of the attached brief. A motion for leave to file is necessary, however, since the petitioners' brief was due no later than January 19, 1978: the attached brief is thus presented outside of the time allowed for the filing of the party supported. Rule 42(2). A typewritten copy of the attached brief was supplied to counsel for each of the parties prior to the filing of this motion.

STATEMENT OF INTERESTS OF AMICI CURIAE

The Environmental Defense Fund, Inc. (EDF) is a non-profit, public-benefit membership corporation organized under the laws of the State of New York. It has offices and resides in New York, the District of Columbia, and in Denver, Colorado and Berkeley, California. EDF's nationwide membership of over 45,000 scientists and other citizens of the United States includes over 8,000 citizens and residents of the 17 western states where Bureau of Reclamation projects are operated. EDF and its members seek to preserve and protect the natural resources and environment of the United States.

The Natural Resources Defense Council, Inc. (NRDC) is a national non-profit membership corporation organized under the laws of the State of New York, and composed of lawyers, scientists, and concerned private citizens who use and enjoy our natural resources and who seek to protect these resources from encroachment and destruction. NRDC has offices in New York, the District of Columbia, and Palo Alto, California, and has approximately 30,000 members nationally. Nearly 9,000 of these members are in the 17 western states where Bureau of Reclamation projects are operated, and more than 3,000 reside in California where this litigation arose.

The Sierra Club is a national non-profit corporation organized and existing under the laws of the State of California with its principal place of business in the City and County of San Francisco, State of California. Sierra Club is a national conservation organization having approximately 155,000 members of whom approximately 80,000 reside in California. The Sierra Club and its members seek to enhance and protect the natural resources and human environment of this country.

EDF, NRDC and Sierra Club exist to promote research and action and to take action on their own behalf, and on behalf of their members, to protect and enhance the natural and social environment, including, but not limited to, the preservation of rivers, wildlife, and recreational opportunities. EDF, NRDC and Sierra Club participate in this case *amici curiae* on their own behalf as well as on behalf of their members, many of whom are directly affected by planned Bureau of Reclamation projects existing, under construction, or in the planning stages in the 17 western states.

This case raises issues of extreme importance concerning the operation of Bureau of Reclamation projects. Whether the Bureau is required to comply with California law in the acquisition of unappropriated water to be used in its operation of the Central Valley Project (CVP) is an important determinant of the environmental impact of the Bureau's activities, and the *amici* organizations and their members are vitally interested in, and directly affected by, the construction and operation of Bureau of Reclamation projects which may be affected by this Court's decision here.

The *amici* have been extensively involved in administrative proceedings and litigation concerning the operation of Bureau of Reclamation projects, raising issues related to

those in the instant case. For example, *amicus* Environmental Defense Fund was a party to the administrative proceedings before the State Water Resources Control Board which culminated in Decision 1422, the administrative decision which gave rise to this litigation. *Amici* NRDC and EDF are also engaged in litigation concerning the construction and operation of another unit of the Central Valley Project, the Auburn-Folsom South Unit. One issue raised in that litigation is whether the Bureau of Reclamation must comply with Decision 1400 of the State Water Resources Control Board which granted and placed terms and conditions on the Bureau's applications to appropriate water for that project. *NRDC, et al. v. Stamm,* No. S-2663 (E.D. Calif. filed December 1972). Proceedings in that case have been stayed pending resolution of the issues in this case. The resolution of the issues presented here is thus of vital concern to these *amici.*

CONCLUSION

For each of the foregoing reasons, the motion to file the attached brief *amici curiae* should be granted.

Respectfully submitted,

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ARGUMENT

I.

SUMMARY OF ARGUMENT

The issues presented by this appeal have been extensively briefed by the State of California, as petitioner. We do not intend to reargue the same considerations. In large part, we concur in the arguments made and the conclusions suggested. There are several points, however, which we feel

merit particular consideration by this Court, yet whose importance may have been obscured by the lengthy briefs submitted to date. It is to those limited issues that this brief will be addressed.

Initially, we believe that this case should be decided on far simpler grounds than those considered by the courts below. It is an axiomatic principle of statutory construction that where a statute is unambiguous on its face, the Court should not look behind the plain language of the statute. In the present case, the language of the statutory provision in issue, Section 8 of the Reclamation Act of 1902, is undeniably clear. Neither the opinion of the District Court or of the Court of Appeals, nor the arguments advanced by the United States below identify any ambiguity in the statute which would require the far-reaching inquiries made by the District Court into the historical background and legislative history of the Act.

A second and related principle of statutory construction which is plainly violated by the District Court's analysis is that it is the duty of Congress and not the courts to amend existing federal legislation. The courts below, in the guise of "statutory interpretation", have actually engaged in a substantial revision of long-standing federal-state water relations. Without questioning the motivations of the courts or the soundness of the decisions, as a matter of water policy it is clear that this approach is unjustified. The wide-ranging policy considerations which underlie the respective positions of the State of California and the federal government concerning water resource utilization are properly left to Congress rather than the courts.

Finally, even if one were justified in looking behind the plain meaning of the statute, the District Court failed to consider the legislative history and historical background

in the proper context. The decisions of the courts below totally ignore the overall framework within which the federal reclamation project in question must operate. Given the complexities of water resource management, and its obvious importance to states and local entities, it is impossible to assume that Congress intended to allow these reclamation projects to operate in a vacuum, irrespective of inextricably interwoven state water policies. Yet that is precisely the result which the analysis of the District Court would achieve.

The District Court points to no comprehensive federal program of water resource utilization designed to supplant the established state machinery. Indeed, it could not point to such a program, for none exists. The lack of a comprehensive federal program of water resource utilization, and the presence of such a system in the states, supports the conclusion that federal reclamation projects were intended to be operated by the federal government in conformity with the framework established by state law. To hold otherwise would be to suggest that Congress, while recognizing the crucial nature of water management, intended that chaos rather than order should prevail in the management of that resource. Such a conclusion cannot be supported.

II.

A. THE DISTRICT COURT ERRED IN ITS ATTEMPT TO LOOK BEHIND THE PLAIN MEANING OF SECTION 8 OF THE RECLAMATION ACT OF 1902.

1. A COURT MAY NOT INQUIRE BEHIND THE MEANING OF A CLEAR AND UNAMBIGUOUS STATUTE.

The primary issue presented in this action was framed by the District Court as follows:

> "Whether a state may impose terms and conditions on the federal government's acquisition of water for reclamation projects." 403 F.Supp. 874, 877.

In resolving this question, both the courts below, as well as the parties, agree that the cornerstone of the inquiry is Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383 (1970). Section 8 provides:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state or federal government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

It is an axiomatic principle of statutory interpretation that where the meaning of a statute is plain and unambiguous, examination of the legislative history is unnecessary and inappropriate. This Court has often held that where the language of a statute is clear, courts should look no further. *Ex parte Collett* (1948) 337 U.S. 55; *Caminetti v. United States* (1916) 242 U.S. 470, 485, 490; *Helvering v. City Bank Farmers Trust Co.* (1935) 296 U.S. 85, 89; *Thompson v. United States* (1917) 246 U.S. 547, 551. In *Caminetti,* the Court adverted to the "recognized rule" that:

> "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning . . . [W]hen words are free from doubt they must be taken as the final expression of the legislative intent and are not to be added to or subtracted from by considerations drawn from . . . reports accompanying their introduction, or from any extraneous source." 242 U.S. at 490.

A corollary to this rule is the principle that legislative history cannot be used to change the meaning of a clear and unambiguous statute. *United States v. Oregon* (1961) 366 U.S. 643. As the Court has stated:

> "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc. v. Walling* (1945) 324 U.S. 244 at 260.

These basic rules of statutory interpretation come squarely into play in analyzing the District Court's treatment of Section 8 of the 1902 Act. *Amici* do not urge the Court to endorse application of rigid rules or strictly linguistic principles of decision making. There are concededly many instances where ambiguous statutory language is susceptible of more than one meaning. See, *e.g., Train v. Colorado Public Interest Research Group* (1976) 426 U.S. 1. In such instances, the legislative history is obviously one source which must be looked to in interpreting the statute. Such is simply not the case here.

2. SECTION 8 IS A PLAIN STATEMENT, AND THE DISTRICT COURT IDENTIFIED NO AMBIGUITIES.

Rarely has a statutory scheme been more clearly and unambiguously expressed than in the language of Section 8. In establishing the framework for federal reclamation projects, Congress explicitly provided that:

1. The Act did not intend to interfere with the laws of the states relating to control, appropriation, use or distribution of water used in irrigation;

2. The Secretary of the Interior was specifically instructed to proceed in conformity with such state laws;

3. The Act was not to affect the existing rights of any governmental entity or private citizen.[1]

Applying these requirements to the present controversy, there is no dispute that under California law, one who seeks to appropriate water must apply for and receive a permit from the California State Water Resources Control Board. California Water Code §§ 1201, 1225, 1250-1258, 1375-1415. In accordance with this requirement of state law, and in accordance with its own long-standing practice, the Bureau of Reclamation duly applied to the Board for permits authorizing the appropriation of water in connection with the New Melones Project. 403 F.Supp. 880.[2] In considering such applications, California law requires "the Board to evaluate the specific intended use of each proposed project and find that it is reasonable, beneficial, and in the public interest. The Board undertakes a balancing of competing demands and policy considerations and has broad discretion. Cal. Water Code § 1240." 403 F.Supp. 880-81. After evaluating the application in light of these criteria, the Board, in Decision 1422, granted the requested permits subject to certain terms and conditions.[3]

This would appear to be the proper disposition of the matter given the state requirements of Section 8 that the Secretary "proceed in conformity with" state law concerning the "appropriation" of water. The Bureau did not chal-

1. Because of the clarity of Section 8, insofar as it compels Bureau compliance with state law, we believe the section satisfies the test of *Environmental Protection Agency v. California* (1976) 426 U.S. 200 and *Hancock v. Train* (1976) 426 U.S. 167.

2. This application was consistent with the Bureau's traditional approach in such matters. The Bureau has always applied to the State Board for permits to appropriate water for the CVP. Likewise, as it did here, the State Board has often subjected its approvals to conditions. See, Brief for Petitioners, at pp. 36-40.

3. The provisions of Decision 1422 are set forth in the opinion of the District Court, at 403 F.Supp. 880-882.

lenge the Board's action as an improper application of state law, under the procedures established by California law for such a challenge. As a result, the *amici* believe that the principle of *res judicata* precludes the United States from challenging the validity of the conditions in a collateral proceeding. *United States v. Utah Construction and Mining Co.* (1966) 384 U.S. 394; *French v. Rishell* (1953) 40 Cal.2d 477.

The United States filed such a collateral action, however, and argued that the laws of the State of California did not, in fact, have to be honored by the Bureau in its attempts to appropriate water for the New Melones Project. The District Court agreed, and through a tortured analysis concluded that Section 8 required compliance only with the "form" but not the "substance" of state laws. 403 F.Supp. 889-890.[4]

4. The District Court's explanation of this interpretation is curious at best. The Court adopted the argument of the United States that applications are to be submitted for appropriations as a matter of comity. Briefly stated, the Court concluded the United States must comply with the forms of state law (e.g., submitting applications) but not with the substance (proper State Board conditions, for example, on those applications). Certainly, nothing in the statute supports such a construction. Indeed, *amici* are hard-pressed to understand how such an act could ever be mandated by statute, since comity is by definition an act *not* required by a particular law. ("Comity is not a rule of law, but one of practice, convenience and expediency . . . Comity persuades but it does not command." *Mast, Foos & Co. v. Stover Manufacturing Co.* (1900) 177 U.S. 485, 488.) More importantly, it is difficult to understand how submitting to the *form* of state law but not the *substance* is a matter of comity. Were the Bureau truly acting on the grounds of comity, the Bureau would conform its actions to the framework of state law, and the principles of comity appear entirely inapplicable to this situation. Significantly, *no* cases have been relied upon by the District Court in support of this novel proposition. The *amici* thus agree that the Court of Appeals properly rejected the comity analysis advanced by the District Court. On the other hand, we also see no textual support in Section 8 for the Court of Appeals' conclusion that Section 8, rather than comity, compels Bureau compliance with the "forms" but not the "substance" of state law.

In reaching this conclusion, the District Court's opinion is glaringly devoid of any discussion of the express terms of Section 8. The court points to nothing in the statute which lends credence to its interpretation. Rather, it purports to place great reliance on the legislative history of the Act. Perhaps the most striking aspect of the District Court's opinion is the total failure to discuss or identify the "ambiguity" or "uncertainty" in Section 8 which forced it to resort to the legislative history in the first place as an aid to its interpretation of that section.[5] Not one sentence of the opinion is devoted to discussing the nature of this presumed ambiguity. *Amici* submit that this failure is explained by the fact that no ambiguity exists.[6] In the absence

5. Significantly, the only mention of any ambiguity or lack of clarity in Section 8 is found in two passing statements which are buried in the middle of the District Court's opinion. By the time it mentioned the existence of a purported ambiguity, the District Court had already virtually completed its discussion of the legislative history. This serves to highlight the Court's total disregard of the statute as written. The two references to a supposed ambiguity are:

> "However, by the inclusion of Section 8, Congress recognized that notwithstanding the national scope of reclamation, state law had important, albeit limited, functions in the equation. Certainly Section 8 on its face does not make crystal clear the role of state law, although it is apparent that state law *does* have a role in regard to federal reclamation projects." (emphasis in original text) 403 F. Supp. at 887.

> ". . . [I]t is certainly not clear from the language of Section 8 nor from the Congressional history that the federal government must apply to states for permits to appropriate or that the federal government must comply with terms and conditions which states might impose on such permits." 403 F. Supp. at 889.

Obviously, the Court was not concerned with explaining what it perceived the ambiguity to be.

6. It is difficult to conceive of more emphatic language which Congress could have used to make its intention clear. Thus, Section 8 provides that "nothing in this Act ***shall be construed as affecting or intending to affect or in any way interfere with***" state law. (emphasis added). As the Court of Appeals for the District of Columbia

of such ambiguity, the District Court's purported reliance on the legislative history is misplaced.

B. THE DISTRICT COURT ENGAGED IN AN IMPROPER EXERCISE OF LEGISLATIVE POWER.

From the foregoing, it is clear that the District Court was not interpreting the terms of an ambiguous statutory provision. Rather, it was violating a second black-letter principle of statutory construction, namely, that it is for Congress, and not the courts, to modify prior legislative enactments.

The very danger which these principles of statutory construction are designed to prevent is plainly illustrated in the present case by the markedly contrasting treatment afforded the legislative history by the lower courts and the United States, on the one hand, and the State of California, on the other. In going back three-quarters of a century, each side has carefully culled those bits and pieces of the legislative record which they believe support their position. While we endorse the State of California's reading of that legislative history, *amici* do not intend to argue herein the soundness of either interpretation of the legislative history.[7] Our quarrel with the courts below comes at a more basic level in that we do not believe the courts

Circuit so aptly stated in a recent decision, "the proper function of legislative history is to resolve ambiguity, not to create it." *FTC v. Manager, Retail Credit Co., Miami Br. Off.*, 515 F.2d 988, 995 (D.C. Cir. 1975). The District Court's attempt to resort to an admittedly unclear legislative history in the face of such clear statutory language certainly does more to create than resolve ambiguity.

7. We refer the Court to the Brief of the Petitioners, at pages 18-36, containing an extensive discusion of the legislative history of the Act. Suffice it to say that we believe that the District Court did not accord a full and fair reading to the legislative history, or to the previous legislative background.

were warranted in engaging in their far-reaching attempts to inquire behind the language of Section 8.

A recent Fourth Circuit case, considering a remarkably analogous situation, graphically illustrates the error of the District Court's approach here. In *West Virginia Division of the Izaak Walton League of America, Inc. v. Butz,* 522 F.2d 945 (4th Cir. 1975), the Izaak Walton League challenged the legality of certain contracts for the sale of timber in the Monongahela National Forest on the grounds that the terms of the contracts violated the Organic Act of 1897. 16 U.S.C. §§ 475-482. In resolving the controversy, the Court interpreted the provisions of a particular section of the Organic Act. The Court held that in the face of the plain language of the statute, the contracts were indeed unlawful, and that subsequent changes in federal agency's practice could not alter the clear Congressional command. In so holding, the Court found that the statutory language of Section 476 was "simple and unambiguous":

> "The appellants urge that this change of policy was in the public interest and that the courts should not permit a literal reading of the 1897 Act to frustrate the modern science of silviculture and forest management presently practiced by the Forest Service to meet the nation's current timber demands. Economic exigencies, however, do not grant the courts a license to rewrite a statute no matter how desirable the purpose or result might be. 'If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the statute or from its legislative history.'" 522 F.2d at 955.[8]

8. It is true that the Court in *Izaak Walton* did discuss the legislative history of the Act. In so doing, however, the Court carefully noted that it based its decision *primarily* upon a literal reading of the statute. Moreover, it completely affirmed the District Court opinion which wholly relied on the literal language of the Act and refused to examine the legislative history on the ground that "it would serve no useful purpose." 387 F.Supp. at 433 (N.D. W.Va. 1973).

In arriving at this decision, the Court was not simply engaging in wooden notions of justice. In refusing to follow the urgings of the federal government to look behind the plain meaning of the statute, the Court recognized that what the government sought was not an interpretation, but an amendment of the statute. As such, the situation presented here is very similar. In *Izaak Walton,* the Court was faced with an 1897 statute which required the federal government to take certain steps prior to selling timber. The Court recognized that with the passage of three-quarters of a century, significant changes may well have transpired in forest resource management and development. Yet the Court did not undertake to evaluate the complex technological or social issues presented by the respective positions of the parties. Instead, it properly recognized that the role which it was being asked to play was not that of a Court, but a legislature. The Court concluded:

> "We are not insensitive to the fact that our reading of the Organic Act will have serious and far-reaching consequences, and it may well be that this legislation enacted over seventy-five years ago is an anachronism which no longer serves the public interest. However, the appropriate forum to resolve this complex and controversial issue is not the courts but the Congress. The controlling principle was stated in *United States v. City and County of San Francisco,* 310 U.S. 16, 29-30, 60 St.Ct. 749, 756, 84 L.Ed. 1050 (1940):
>
> 'Article 4, § 3, Cl. 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for the Congress."'" 522 F.2d at 955.

The similarities between *Izaak Walton* and the present situation are manifest. In each case, the District Court was called upon to consider a statute dating from the turn of the century. Likewise, in both instances the language of the statute was plain and unambiguous, and the respective federal agency involved was attempting to obtain a "judicial amendment" of the statute. In *Izaak Walton,* however, the District Court took the proper course and refused to engage in a balancing of the competing interests. Instead it applied the statute as it had been written. In the present case, the District Court chose the opposite course and attempted to reinterpret the statute, apparently in order to achieve what it deemed to be the proper result in a controversy between the State of California and the federal government over water resource management.

Without regard to the merits of the positions of the state and federal governments vis-a-vis the water use, it is clear that Section 8 of the 1902 Act requires the federal government to comply with state laws in appropriating water for its reclamation projects. To hold otherwise is to disregard the plain meaning of the statute. If Congress desires to modify the Federal-State relationship which it previously established, then it, not the courts, must act.

C. THE DISTRICT COURT'S INTERPRETATION OF THE LEGISLATIVE HISTORY FAILS TO PROPERLY CONSIDER THE TOTAL FRAMEWORK OF FEDERAL-STATE WATER RELATIONS.

If it nevertheless be deemed necessary to go behind Section 8 of the Reclamation Act in interpreting the Congressional purpose, the legislative history is, of course, one

place to look.[9] In addition, one must look to other relevant legislative enactments. There is one further evaluation to be made in interpreting the meaning of this section of the Reclamation Act which deserves additional mention, especially since it was ignored in the proceedings below.

The Reclamation Act is a specific statute which deals with but one aspect of a far broader area of concern. As such, the Act and its legislative history must be read in the context of that broader concern, not in isolation. When one views the Act as but one part of an evolving effort to develop, maintain and properly utilize the Western States' water resources, it becomes apparent that the limitations

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9. *Amici* realize that the Court must, of course, look to applicable prior case law in resolving this controversy. Such a review provides little assistance in the present case, however, as none of the decided cases faced the issue presented here. As the District Court correctly found, this is essentially a case of first impression. At most, the decided cases stand for the proposition that where the requirements of a specific provision conflict with the general power given to the states by Section 8, the specific provision will prevail. In *Ivanhoe Irrigation District v. McCracken* (1958) 357 U.S. 275, the Court held that the provisions of Section 5 of the Act, which provide that no project water should be sold for use on properties exceeding 160 acres, could not be defeated by the State of California because it would be contrary to state law. Likewise, *City of Fresno v. California* (1963) 372 U.S. 627 considers the relationship between Sections 7 and 8 of the Act. The Court held that the exercise of eminent domain power under Section 7 cannot be defeated by recourse to the more general provisions of Section 8. Finally, in *Arizona v. California* (1963) 373 U.S. 546, the Court was faced with the task of reconciling several sections of the Boulder Canyon Project Act. As it had in its previous Reclamation Act decisions, the Court concluded that the general provisions of the statute in question must not be read so as to negate more specific provisions. While there is discussion of Section 8 of the Reclamation Act in dictum in the opinion, the Court was not called upon to rule on the application of Section 8. The California Supreme Court has recently so interpreted these cases, although we believe the Court misapplied this Court's holdings to the facts of the case. *Environmental Defense Fund v. East Bay Municipal Utility District* (1977) 20 Cal.3d 327.

which the District Court purports to find in Section 8 were not intended by Congress, since an examination of federal and state water law reveals:

1. A lack of any method on the part of the federal government, and a disinclination by Congress to establish such a method, for apportioning intra-state water rights or managing water resources;

2. The concomitant existence of a well-developed state system for determining rights to unappropriated water, and a comprehensive plan for water resource apportionment and management.

1. There Is No Comprehensive Federal Plan for Water Resource Management or Appropriation of Water Rights.

If the lower courts were correct, the Reclamation Act does not require the federal government to comply with state law in the operation of its reclamation projects. This might be a palatable conclusion had the Reclamation Act (or any other federal law) established a method for determining water rights or charged the federal government with maintaining a comprehensive system of water resource usage and management. But such is simply not the case. As the National Water Commission, a federal commission established by Congress to study and report on water programs and policies in relation to the environment,[10] noted in discussing the Reclamation Act and similar federal water programs:

> "These programs came into being one at a time as the American people reached a consensus that a problem existed and that it would be proper for the Federal Government to play a part in solving that problem. But throughout the almost two centuries in which this was taking place the Nation was growing, new demands were evolving, and the people's concept of the role of the Federal Government was changing. It is not surprising, therefore, that some of the basic policies underlying these programs are inconsistent, and, in many respects, anachronistic when viewed in the light of what has happened since they were established." *Water Policies For the Future,* Final Report to the President and to the Congress of the United States by the National Water Commission, June 1973, p. 111 ("National Water Commission Report").

10. See, P.L. 90-915 (1968).

The Reclamation Act is precisely that—a program conceived for a specific purpose at a specific time. Nothing in the lower courts' discussion of the legislative history even remotely suggests that the Act attempted to establish any comprehensive plan for allocating and managing water resources at that time or in the future. Nor do the decisions below point to any other comprehensive federal policy or program for the development of water resources or the apportionment of those resources. This is for the obvious reason that the Congress did *not* intend for the federal government to pre-empt this field.

If Congress had intended the federal government to appropriate water or operate its projects *outside* the scope of state laws, it surely would have established an alternative system in 1902 or at some point thereafter. Yet the absence of comprehensive water policy program on the part of the federal government has persisted to the present. As the National Water Commission noted in its 1973 Report:

> "This Commission concluded early in its life that it had no more important task than that of reappraising existing policies and programs in the light of changed conditions and needs, and of distilling from the results of these appraisals guidelines for bringing the water policies and programs of the United States into con-

sonance with the needs of the Nation in the remaining decades of the 20th Century."

• • • • • • • •

". . . [T]he Nation has not kept its water policies and programs up to date. It indicates that the kinds of programs the Water Resources Planning Act was intended to bring into being cannot be attained unless the legislation underlying the component programs is brought into consonance with a single set of rational principles and modified to meet changed conditions and demands." *Id.*, at 112-113.

Given the absence of any comprehensive federal program, the conclusion reached by the lower courts that Congress did not intend state law to apply to reclamation projects is at best questionable. Such a conclusion would mean that Congress intended that there be no systematic approach to water problems at any level of government. It would mean that Congress intended to provide no mechanism for resolution of conflicts between state and federal programs, or between one federal program and another. In short, it would mean that water policy would inevitably be made on an *ad hoc* basis.

We submit that such a conclusion is contrary to reason. Water is a precious and limited national resource, "one of several resources without which a Nation cannot satisfy the fundamental wants of its people or achieve the important national goals it sets for itself." National Water Commission Report, at *ix*. Congress was surely aware when it passed the Reclamation Act that some method must exist for regulating water usage and balancing the competing demands for water. The fact that Congress plainly did not attempt to remove power from the states, vest such authority in the Bureau of Reclamation, or any other federal agency, strongly suggests that Section 8 was in-

tended to be given its literal meaning—and federal reclamation projects were to be operated by the Bureau in accordance with applicable state laws. An examination of California's water law system, for example, leaves little doubt that Congress intended that comprehensive determination of water rights and management of water resources remain the province of state laws.

2. California Law Provides a Comprehensive System for Appropriation and Management of Water Resources.

In sharp contrast to the complete absence of a system of water appropriation and management in the Reclamation Act, or elsewhere in federal law, is the existence of such a system in the State of California.[11]

---

11. The concern of the State for its water resources finds expression in Article XV, Section 2 of the California Constitution:

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

Long before the enactment of the Reclamation Act in 1902, California had recognized a system for establishing water rights.[12] This system of appropriative rights began as an informal custom, and subsequently became formally recognized as the law of the state.[13] It was this system of appropriation which existed in 1902 when the Reclamation Act was passed. Again, there was no federal method of appropriation established, and Section 8 thus expressly provides that state law "relating to . . . appropriation . . . of water was intended to govern federal activities.

Subsequent to that time, and continuing through the present, these fundamental concepts of water regulation have been constantly refined. The California Water Commission Act of 1913 created the State Water Commission, and further defined procedures for obtaining water rights. Ch. 586, 1913 Cal. Stat. 1012. Without attempting to consider exhaustively the sophisticated system of water resource allocation and control developed by the State of California, it is fair to say that the nature of the interests considered by the State in determining water rights has greatly expanded over the years. What originated as primarily economic concerns have broadened with an increasing recognition of the importance of environmental factors, including preservation of fish, wildlife, and natural beauty. All of these concerns have been voiced and accommodated in California's scheme of water resource management.

12. This system of appropriative rights is common throughout the arid states of the western United States, where the Reclamation Act has its focus. *See*, F. Trelease, *Water Law* (1967).

13. The California Supreme Court first recognized the principle of appropriative rights in *Irwin v. Phillips*, 5 Cal. 140 (1855). Legislation passed in 1872 established formal procedures for obtaining appropriative rights.

This process of evolution led to the creation of the State Water Resources Control Board in 1967. Ch. 284, 1967 Cal. Stat. 1441, § 1. With the creation of the Water Resources Control Board ("Board"), responsibility for water rights and water quality, previously the respective functions of the State Water Rights Board and State Water Quality Control Board, was vested in one agency.

Applications to the Board are thus the current method for establishing appropriative rights to water in California. All applications to appropriate water in California must be filed with the Board. Cal. Water Code § 1225. In processing these applications, the Board is not only responsible for determining whether unappropriated water is available, but also for evaluating whether the proposed use is beneficial and in the public interest. Cal. Water Code §§ 1200-01, 1240, 1253, 1255.[14] The stated purpose of the Legislature in establishing the Board was to provide a single mechanism to effectively control and regulate the state's water resources. Cal. Water Code § 174. Broad discretion is vested in the Board to balance competing interests in arriving at water allocation decisions, and the Board is vested with authority to condition the issuance of permits on appropriate terms and conditions, as well as to retain jurisdiction to modify permits it has previously granted. California Water Code § 1394.

Decision 1422, which provoked the initiation of this litigation, represents an attempt by the Board to implement these comprehensive planning considerations. In arriving at its decision, the Board viewed the Bureau appropriation

14. For a more comprehensive discussion of the role of the Board and the development of water management in California, *see* Robie, *Some Reflections on Environmental Considerations in Water Rights Administration*, 2 Ecology L.Q. 695 (1972).

requests for the New Melones Project not in isolation, but in the larger context of the overall water resource needs of the State of California. In addition to the substantial harm to the Stanislaus River which the proposed water use would cause, the Board also found the Bureau had not shown any plan for the use of water, and had not demonstrated a present need for the water from the Stanislaus in light of the fact that the Bureau has ample water elsewhere.[15]

The Bureau, whose own applications for permits led to Decision 1422, thus found itself confronted with a Board decision it did not like. Faced with this problem, the Bureau determined that while it had lived with state procedures for many years, current state laws and policies on water appropriation were not to its liking, and therefore repudiated the State Board's decision, precipitating this litigation. In so doing, the Bureau has chosen the wrong remedy for its disagreement. Instead of taking its case to the Congress to repeal Section 8 in whole or in part, the Bureau has elected to seek a judicial readjustment of the long-standing State-Federal relationship in this area.

The District Court did not find that the rationale of the Board was incorrect or ill advised. Nor did it find that the federal government had a better reasoned program for usage of the water. Instead it found that the Bureau of Reclamation did not have to comply with state law in appropriating water for its projects. Even apart from the plain language of the statute and its legislative history,

15. "Furthermore, the record shows that C.V.P. has substantial quantities of water that are not being used and are not under contract. The Bureau's own records indicate that without the yield of the New Melones Reservoir the Bureau can meet the estimated buildup of demands under present contracts for a long period of years." California State Water Resources Control Board Decision 1422 at 14.

it is simply illogical to assume that Congress intended such a result. There is no contention in this case that the federal government has set up any system for appropriating water or evaluating requests for appropriation. Yet California has consistently over three-quarters of a century developed and continuously refined a comprehensive system for precisely that purpose. Coupling this with the fact that the Bureau has traditionally applied to the state for appropriation permits, the lower courts' rejection of consistently exercised authority is simply incorrect.

III.
CONCLUSION

For all of the reasons advanced herein, the *amici curiae* respectfully submit that the decision of the Court of Appeals should be reversed.

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No. 77-285

STATE OF CALIFORNIA, et al., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS AS AMICUS CURIAE

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43 Stat. 685 14

76 Stat. 1173 (1962) 4

76 Stat. 1191 ..... 4, 24, 26, 28

Nevada Revised Statutes § 704.230 as amended in 1977. 8

43 C.F.R. § 418 29

38 F.R. 6697 (1973) 2, 29

LEGISLATIVE HISTORY:

35 Cong. Rec. 6775 (1901) 8

TREATISES AND OTHER AUTHORITIES:

Clark, Condemnation of Water Rights for Preferred Uses—A Replacement of Prior Appropriation? 3 Willamette L.J. 215 (1966) 15

Bureau of Reclamation, Department of Interior, Project Feasibilities and Authorizations (Gov't Print. Office 1957) 18

Hundley, Water and the West (1975) 18

Hutchins, Water Rights Laws in the Nineteen Western States 176 (1971) 12

Sax "Federal Reclamation Law" 2 Clark, Waters and Water Rights 3, 13

1 Weil, Water Rights in the Western States §§ 408 and 409 [3rd Ed. 1911] 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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BRIEF OF THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Both the United States and the State of California have consented in writing to the filing of this Brief. Their letters have been filed with the Clerk's Office.

The primary goals of the Pyramid Lake Paiute Tribe of Indians of Nevada are to restore and then preserve its once world renowned fisheries in the Truckee River and Pyramid Lake. The most important element in the restoration effort is securing the necessary waters and water rights. *United States* v.

Nevada, 412 U.S. 534 (1973); *Pyramid Lake Paiute Tribe of Indians* v. *Morton,* 354 F.Supp. 252 (D.D.C. 1973).

The Tribe's interest in this case arises out of the Washoe Project, a federally authorized, partially complete reclamation project, 70 Stat. 775, 43 U.S.C. § 614 et seq. Section 4 of that Act, 43 U.S.C. § 614c, mandates the restoration of the Pyramid Lake fishery.

As part of the authorized Washoe Project, Stampede Reservoir on the Little Truckee River in California was completed in 1970. Since 1973, the Secretary has operated Stampede in accordance with Operating Criteria and Procedures designed to maximize the benefits to the Pyramid Lake fishery. *See Pyramid Lake Paiute Tribe of Indians* v. *Morton, supra;* 38 F.R. 6697 (1973).

In 1976 the State of Nevada, joined by two water distributing entities, brought suit against the Secretary of the Interior challenging his operation of Stampede Reservoir. *Carson-Truckee Water Conservancy District* v. *Andrus,* Civil No. R-76-152 BRT in the United States District Court for the District of Nevada at Reno.[1] The plaintiffs in that case seek a court order requiring the Secretary to enter into a contract to supply Nevada interests with water for irrigation, domestic, municipal and industrial and other purposes. They claim, *inter alia,* that domestic uses are entitled to a preference under California law and that utilizing the waters stored in Stampede Reservoir for restoration of the Pyramid Lake fishery constitutes waste

[1] The Tribe is lodging three copies of the Amended Complaint with the Clerk and is serving copies on the United States and the State of California.

under Nevada law. The Pyramid Lake Tribe has intervened as a defendant.

The outcome of this case could have an important bearing on *Carson-Truckee Water Conservancy District* v. *Andrus, supra.* For that reason the Tribe has filed this Brief Amicus Curiae.

ARGUMENT

I. The Plain, Literal, Unambiguous Meaning of Section 8 Excludes the Conditions Imposed by Decision 1422

The primary argument urged by California and the supporting *amici* states is based on "the simple, plain meaning" of Section 8.[2] They contend that the Secretary of the Interior must proceed in conformity with all state laws relating to control, appropriation, use or distribution of water. That is not what the statute says.

Section 8 of the Reclamation Act, 32 Stat. 388, 390 (1902), 43 U.S.C. § 372, does not incorporate all state water laws. It is limited to those laws "relating to the control, appropriation, use, or distribution of water *used in irrigation.*" Emphasis added. The Secretary is required to "proceed in conformity with" those laws, no others.[3]

The 25 conditions imposed by Decision 1422 have nothing to do with irrigation. They relate to prefer-

[2] California's Brief, p. 12.

[3] *See* Sax, "Federal Reclamation Law" in 2 Clark, Waters and Water Rights pp. 150-151 n.65 (1967). Even as to conditions relating to irrigation, state jurisdiction appears to be foreclosed and preempted by the Act of August 13, 1914, 38 Stat. 688, 43 U.S.C. § 440, which authorizes the Secretary of the Interior "to make general rules and regulations governing the use of water in the irrigation of the lands within any project . . ."

ences for so-called counties of origin (Nos. 4 and 25), downstream water quality (No. 5), protection of fish and wildlife (No. 2), access by state officials (Nos. 15 and 16), studies of water related matters (Nos. 3, 7, 8, 12 and 21) and whitewater river rafting (Nos. 1 and 2). These non-irrigation related conditions are outside the scope of the state laws referred to in Section 8.

California seeks to circumvent this fatal flaw and avoid the plain, literal, unambiguous language of Section 8 through a one sentence footnote that states:

> Although § 8 pertains only to water for "irrigation," it is made applicable to other purposes of multi-purpose projects by the usual congressional directive that the project is to be operated "pursuant to the Federal reclamation laws," a directive found in the act authorizing the New Melones Project. 76 Stat. 1191 (1962).[4]

The contention obviously fails. It is true that most, if not all, multi-purpose projects undertaken since 1939[5] include a proviso that brings the new project under the Reclamation Act of 1902 as amended. *See, e.g.*, the Washoe Project Act, 43 U.S.C. § 614a(a), and the legislation authorizing New Melones, 76 Stat. 1173, 1191 (1962). The effect is to incorporate Section 8 and the other provisions of the Reclamation laws. But absent some amendment to or modification of Section 8 itself, these provisions cannot change its coverage, meaning, or scope which remains limited to state "laws . . . relating to . . . water used in irrigation." In other words, the fact that projects may be authorized for purposes other than irrigation does not and can-

[4] California's Brief, p. 18 n.13.

[5] *See* text at pp. , *infra*.

not incorporate state substantive water laws relating to subjects other than irrigation. *Hancock* v. *Train*, 426 U.S. 167 (1976).

First Iowa Hydro-Electro Co-op. v. *Federal Power Commission*, 328 U.S. 152 (1946), presented an analogous question relating to the meaning and scope of Section 27 of the Federal Power Act, 41 Stat. 1063, 1076 (1920), 16 U.S.C. § 821, which is similar to, but broader than, Section 8. Section 27 provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.[6]

First Iowa held that an Iowa law designed to protect fish life which prohibited interbasin transfers of water was not saved or incorporated by Section 27 because the Iowa law fell outside the scope of its coverage. 328 U.S. at 165-166 and 175-176. The Court reasoned (328 U.S. at 175-176):

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to

[6] This statute, passed in 1920, demonstrates that Congress was keenly aware of the distinction between state water laws relating to irrigation and other types of uses and that when Congress intended to save or incorporate state laws relating to municipal and other uses, it said so.

> property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.

The holding of *First Iowa* limiting the coverage of Section 27 of the Federal Power Act to specific property rights defined by state law is controlling here because Section 27 refers to "water used in irrigation or for municipal or other uses" whereas Section 8 is limited solely to irrigation. This Court has noted the close connection between Section 27 of the Federal Power Act as construed in *First Iowa* and a provision of the Boulder Canyon Project Act that is virtually identical to Section 8. *Arizona* v. *California,* 373 U.S. 546, 588 n.93 (1963).[7]

II. Federal Legislation Leaves No Room Or Need for State Controls

The Reclamation laws, now supplemented by later legislation that applies to all of the federal government's water resource undertakings, comprise a pervasive and comprehensive package that leaves no room for imposition of mandatory state controls and/or con-

[7] Subsequent decisions interpreting and applying Section 27 of the Federal Power Act have emphasized its similarity to Section 8 of the Reclamation Act and have relied on this Court's interpretation of Section 8 in City of Fresno v. California, 372 U.S. 627 (1963), and Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958). *See* Scenic Hudson Preservation Conference v. Federal Power Commission, 453 F.2d 463, 478 (2d Cir. 1971), *cert. denied,* 407 U.S. 926; State of California v. Federal Power Commission, 345 F.2d 917, 923 (9th Cir. 1965); and Portland General Electric Co. v. Federal Power Commission, 328 F.2d 165, 176-177 (9th Cir. 1964).

ditions. Existing law as well as long prevailing reclamation practices insure that the states' voices have been and will continue to be heard in planning, constructing and operating reclamation projects. It is neither necessary nor desirable to subject federal projects and installations to the jurisdiction of the western states.

A. Federal Developments Often Located on Interstate Streams and Subject to the Regulations and Operational Control of the Secretary of the Interior Are Not Subject to the Jurisdiction of State Administrative Agencies.

There are three aspects of the federal reclamation program that should be noted at the outset. First, reclamation projects are direct federal undertakings that involve large expenditures of federal funds and the construction of massive federally owned and operated facilities. The reclamation program is not a regulatory or even a licensing scheme. *Contrast Burbank* v. *Lookheed Air Terminal,* 411 U.S. 624 (1973); and *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (1955). Traditionally federal installations and facilities are "free from regulation by any state." *Hancock* v. *Train,* 426 U.S. 167, 178 (1976); *Environmental Protection Agency* v. *State Water Resources Control Board,* 426 U.S. 200 (1976); *Arizona* v. *California,* 283 U.S. 423 (1931).

Second, the reclamation program often involves developments on interstate streams where waters are stored in one state and utilized in another. The Washoe Project, 70 Stat. 775 (1956), 43 U.S.C. §§ 614-614d, on the Truckee and Carson Rivers in California and Nevada is an example. Interstate developments were con-

templated from the inception of the Reclamation program. Section 8 itself provides that nothing in the act "shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof."[8] And one reason that President Roosevelt advocated enactment of a national reclamation act was that "far-reaching interstate problems are involved; and the resources of single states would often be inadequate."[9] *See also* the statements of Congressmen Mondell and Newlands quoted in the District Court's opinion, 403 F.Supp. 874 at 885 and 887, reproduced in the Appendix to the Brief for the United States in Opposition to the Petition for Certiorari at pp. 21a-22a and 26a-27a.

If Section 8 is held to authorize state control of reclamation projects through the imposition of conditions on permits authorizing the appropriation of water, one immediate question that will arise on interstate projects is, "whose conditions?" In the case of the Stampede Division of the Washoe Project, whose conditions would take precedence, California's, where the water is impounded, or Nevada's, where most of it is used? The probability of conflict is apparent.[10] In

[8] This part of Section 8 is discussed in Wyoming v. Colorado, 259 U.S. 419, 463 (1922). Its legislative history is reviewed in the Appendix to California's Brief.

[9] 35 Cong. Rec. 6775 (1901), quoted in California's Brief at p. 23.

[10] For example, California might require as a conservation measure that communities contracting for water from Stampede Reservoir for municipal purposes have a metering system. But there is a Nevada law that prohibits the installation of water meters in Reno and Sparks. Nevada Rev. Stat. § 704.230 as amended in 1977.

Arizona v. *California,* 373 U.S. 546, 589-590 (1963), the Court cited the possibility that projects would be subjected to the "varying, possibly inconsistent, commands of the different state legislatures" as one reason why the Boulder Canyon Project Act did not make state laws applicable to developments on the Colorado River. It is impossible to apply Section 8 one way when projects are within a single state but to give it a more restricted meaning when interstate projects and streams are involved.

Third, in interpreting the meaning of Section 8, the Court must look not only to the language and legislative history of that provision, but to the Reclamation Act as a whole. *Chemeheuvi Tribe of Indians* v. *Federal Power Commission,* 420 U.S. 395, 403 (1975). In particular, Section 10 of the 1902 Reclamation Act, 32 Stat. 388 at 390, 43 U.S.C. § 373, delegates broad and comprehensive authority to the Secretary of the Interior to carry out the reclamation program.

> The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

Further, under the Reclamation Act as originally enacted, reclamation projects were actually operated by

Another actual example is provided by the amended complaint in Carson-Truckee Water Conservancy District v. Andrus, *supra,* where the plaintiffs, who are interested only in the use and distribution of water in Nevada, invoked the provisions of California Law that afford a preference for domestic over irrigation uses. *See* the Amended Complaint lodged with the Clerk of this Court at pp. 9-11. While that particular claim is foreclosed by City of Fresno v. California, 372 U.S. 627 (1963), it is illustrative of the kinds of problems that arise on interstate projects and streams.

the Reclamation Service. Section 6 specifically provided that "the title to and management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the government until otherwise provided by Congress."[11] Section 2 authorizes and directs the Secretary to make examinations and surveys and to locate and construct irrigation works for the storage, diversion and development of waters. Section 7 authorizes the Secretary to acquire any necessary rights or property by purchase or condemnation.

This Court has given effect to the Reclamation laws as well as similar delegations of authority by granting broad latitude and discretion to administrative officials in implementing the legislative program. *Arizona* v. *California,* 373 U.S. 546, 575-590 (1963); *Dugan* v. *Rank,* 372 U.S. 609 (1963); *Berman* v. *Parker,* 348 U.S. 26, 35 (1954); *United States ex rel. TVA* v. *Welch,* 327 U.S. 546, 551-552 (1946). *See also United States ex rel. TVA* v. *Two Tracts of Land,* 532 F.2d 1083 (6th Cir. 1976); *United States* v. *2,606.84 Acres of Land in Tarrant Co., Tex.,* 432 F.2d 1286 (5th Cir. 1970), *cert. denied,* 402 U.S. 916, *rehearing denied,* 403 U.S. 912; *Turner* v. *Kings River Conservation District,* 360 F.2d 184 (9th Cir. 1966).[12]

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[11] As we shall see *infra,* the Act was subsequently amended to authorize the Secretary to enter into operation and maintenance contracts with an association of the water users on each project.

[12] Owing to the pendency of critically important litigation in the Court of Appeals for the Ninth Circuit to which it is a party, *Amicus Curiae* Pyramid Lake Paiute Tribe of Indians wishes to make clear that the Secretary's powers under the Reclamation Act do not authorize him to extinguish Indian property rights in the absence of an explicit statutory directive. *See* Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. Santa Fe Pacific Railway Co., 314 U.S. 339 (1941); United States v. Winnebago Tribe of Indians, 542 F.2d 1002 (8th Cir. 1976). Henkel v. United States, 237 U.S. 43 (1915), stands for the proposition that the Secretary has "broad" and "comprehensive" authority under the Reclamation Act, and may acquire the land of an individual Indian when (a) it is consistent with the relevant Indian laws, and (b) he "deals fairly with the Indians." 237 U.S. at 50. *See* Morton v. Ruiz, 415 U.S. 199, 236 (1974); and Delaware Tribal Business Committee v. Weeks, —— U.S. ——, 51 L.Ed.2d 173, 183 (1977).

The question that is posed by this litigation is whether the actual operation of reclamation projects is within the Secretary's authority under Sections 10, 7, 6 and 2 of the Act or is subject to the provisions of state law under Section 8.

In this same connection it should also be noted that the kinds of conditions imposed by the State Water Resources Control Board in Decision 1422 are of relatively recent origin.[13] Traditionally, state administrative agencies have simply determined whether there are any surplus waters. If so, appropriate permits were issued.[14] Consequently, insofar as Congress can be said

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[13] California points out that though its permit system was not initiated until 1914, Wyoming and three other states had adopted such programs by 1902. The issue here relates not so much to the existence of a permit system as to whether Congress has conferred jurisdiction on state agencies to impose operating conditions and limitations on federal projects.

[14] The leading water authority at the turn of the century states that the power of state engineers under the early appropriation statutes, then referred to as "the new legislation," is "ministrial." 1 Weil, Water Rights in the Western States §§ 408 and 409 [3rd Ed. 1911]. With regard to the provisions of the statutes granting authority to state engineers to reject applications which are con-

to have contemplated operating restrictions of the kind imposed by Decision 1422, they are much more

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trary to public policy, Weil quotes a 1906 Bulletin published by the U.S. Department of Agriculture:

> Wyoming, the pioneer State in providing for the public supervision of the acquirement of rights, gives the engineer authority to reject applications which are contrary to public policy. This has been followed by most of the States which have adopted codes in recent years. This provision is so general in its terms that it may be interpreted to mean much or little. In Wyoming the exercise of this authority has given him a great deal of trouble. The engineer of Nevada holds that this provision gives him no authority to reject applications which conform to the general rules of the office. The Utah engineer held that this provision gave him authority to choose between possible uses and refused an application for a use which in his opinion was not for the best possible use of the water. Appeal was taken to the courts, the engineer was overruled in this matter, and at the next session of the legislature the law was repealed. In the other States which have adopted this provision the law is not effective. It appears, therefore, that this law is either ineffective or unpopular with both the engineers and the public . . . .

1 Weil, *supra* § 416. There is no mention of either any power of state engineers to impose detailed conditions on water permits or any instance where any such power was exercised.

See also Hutchins, Water Rights Laws in the Nineteen Western States 176 (1971), where is it said: "Administrative procedure governing the acquisition, determination, and administration of water rights, in contrast with its early stages, has become highly developed throughout the West." The same authority also notes: (1) that Art. XVI, § 6 of the Colorado constitution provides that "The right to divert the unappropriated waters of any natural stream shall never be denied;" (2) that under Idaho law an appropriator may follow either the "constitutional" procedure of diverting water and applying it to a beneficial use or the formal statutory procedure; and (3) that in Montana "there is no control over the appropriation of water centered by statute in the State administrative organization." 1 Hutchins *supra* at 177-178. Thus it appears that even today the conditioning procedures utilized by California's Water Resource Control Board are not available to the water agencies in some of the other western states.

likely to have been included within the delegation of operational and regulatory authority to the Secretary rather than Section 8's grant of jurisdiction to the states.

B. The Reclamation Scheme Provides for Unitary Management Under the Control of the Secretary of the Interior.

The outcome of this case is controlled by the holding of *Arizona* v. *California*, 373 U.S. 46, 575-590 (1963), that the Secretary's powers under the Boulder Canyon Project Act, particularly the authority to enter into water supply and cost reimbursement contracts, preempt the field so that "state law has no place." 373 U.S. at 588. The general reclamation laws taken together with the acts authorizing particular projects, like the Boulder Canyon Project Act, "can function efficiently only under unitary management" where the Secretary has "sufficient power . . . to direct, manage and coordinate" the operation of reclamation facilities. 373 U.S. at 589 and 590.

As we have seen, the original 1902 Reclamation Act delegated broad and comprehensive powers to the Secretary of the Interior. Since then Congress itself has exerted increasing control.[15]

Under the 1902 Act, the Secretary had authority to initiate projects as long as there was money in the reclamation fund established by Section 1 of the Act.[16] The only requirement was that he determine that a

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[15] This discussion relies heavily on Sax, "Federal Reclamation Law" in 2 Clark, Waters and Water Rights ch. 8 (1967).

[16] Sax, *supra* note 15 at pp. 121-122 and 136.

proposed project was "practicable," i.e. that it was able to repay its costs.[17] In 1910, Congress provided that no irrigation projects could be initiated unless they were approved by direct order of the President.[18] The so-called Fact Finders Act of 1924 required that the Secretary's report to the President include information regarding water supply, engineering features, cost of construction, land prices and probable cost of development.[19] The Secretary must make a written finding that the project "is feasible,[20] that it is adaptable for actual settlement and farm houses, and that it will probably return the cost thereof to the United States." 43 U.S.C. § 412.

The current project initiation procedures have their roots in Section 9(a) of the Reclamation Project Act of 1939, 53 Stat. 1193. Professor Sax' summary of those procedures is succinct and accurate and is here reproduced with some of the footnotes omitted.[21]

> Section 9(a) . . . provides that "no expenditures for the construction of any new project . . . shall be made . . . by the Secretary until after he has made an investigation thereof and has submitted to the President and to the Congress his report and findings on" engineering feasibility, the estimated cost of proposed construction and the part of the cost which can properly be allocated to irrigation, power, municipal and miscellaneous

[17] Section 45 of the 1902 Act.

[18] Act of June 25, 1910, 36 Stat. 836, 43 U.S.C. § 413.

[19] Act of December 5, 1924, 43 Stat. 702, 43 U.S.C. § 412.

[20] Findings of both, "agricultural and engineering feasibility" were required. 43 Stat. 685.

[21] *Supra*, note 15, pp. 139-141.

purposes and probably be repaid to the United States. It then continues:

> If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations . . . together with any allocation to [non-reimbursable purposes] equal the total estimated cost . . . then the new project . . . shall be deemed authorized and may be undertaken by the Secretary.

In practical operation, this provision is implemented by certain preliminary steps to be taken before any project can get under way. The first is a reconnaissance investigation, which is a preliminary field report initiated by the Bureau of Reclamation. "The chief purpose of the reconnaissance report is to indicate whether further detailed investigations are justified." If the reconnaissance report shows that a possible development plan may be feasible, and if there has been specific authorization by Congress,[22] the Bureau may proceed with its major investigation leading toward the preparation of a so-called feasibility report.

The basic document upon which authorization of a project rests is the regional director's report. This report contains a comprehensive analysis of the project area, water supply, construction plans, agricultural economy and needs, repayment capability of farmers, economic justification based on

[22] Federal Water Project Recreation Act of July 9, 1965, P.L. 89-72, § 8, 79 Stat. 217, 16 U.S.C. 460*l*-19. The real reason for imposing a specific authorization requirement, it is reported, was to prevent the Bureau of Reclamation from undertaking a study of the feasibility of importing water from the Pacific northwest into the Lower Colorado River Basin. Clark, Condemnation of Water Rights for Preferred Uses—A Replacement of Prior Appropriation?, 3 Willamette L.J. 215,229 (1966).

a benefit-cost analysis, allocation of costs among functions in a multi-purpose project, analysis of reimbursement ability among the uses, a conclusion, and a recommendation as to authorization."[33] The principal features of the report are the findings of engineering and financial feasibility (ability of the project to repay its reimbursable costs), both of which the statute expressly requires, and of economic feasibility (benefit-cost analysis). A finding of economic feasibility is not expressly required by the reclamation laws; it is a requirement which has been derived from the Flood Control Act. . . .

If the regional director's report is favorable, it is forwarded to the Secretary. The Secretary is required, under the Flood Control Act, to give to affected states and to the Secretary of the Army information developed by his investigations and an opportunity to co-operate therein; moreover, he is required to transmit to them a copy of his proposed report for their written views and recommendations, which he must then submit to Congress along with his report. If the submissions of the affected states or the Secretary of the Army set forth objections to the proposal, it may not be authorized except by an Act of Congress, which is, in practice, required anyway.

In addition, the Secretary is required to consider water quality control as well as to consult with wildlife officials in each state in which there is to be construction "with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as by providing for the development and improvement

[33] When the Secretary recommends a project to Congress, his report and the report of the regional director, which the Secretary has also forwarded, are customarily printed together as a House Document.

thereof." In this connection any state agency's reports must be made "an integral part" of any report by the Secretary, and the Secretary must "give full consideration to" any such report in his project plans.

Subject to the foregoing limitations, upon a finding of feasibility, and upon submission to the President and Congress of his report and findings, a project is automatically "deemed authorized and may be undertaken by the Secretary."[34] In fact, the automatic authorization procedure is not currently used; congressional authorization of each project is obtained.

The statutory submission to the President is accomplished by sending the report to the Bureau of the Budget for "advice concerning the relationship of the project to [the President's] program before transmitting the report to the Congress." At this point the Secretary sends his report to Congress, recommending that authorization be made by statute. The authorization acts frequent-

[34] Act of August 4, 1939, ch. 418, § 9(a), 53 Stat. 1193, 43 U.S.C. 485h (a). Even if the Secretary utilized the automatic authorization device, he could not, as a practical matter, undertake to go ahead with the project on his own, since a 1914 statute prohibits the Secretary from expending reclamation fund money except as authorized by annual congressional appropriations. Act of August 13, 1914, ch. 247, § 16, 38 Stat. 690, 43 U.S.C. 414. It has not been thought that this restriction is affected by the "may be undertaken" language of the Reclamation Project Act of August 4, 1939, ch. 418, § 9 (a), 53 Stat. 1193, 43 U.S.C. 485h (a). But see Reclamation Project Act of August 4, 1939, ch. 418, § 9 (b), 53 Stat. 1194, 53 U.S.C. 485h (b).

A project found not feasible may still lawfully be undertaken by the Secretary after special provision for it has been made by Act of Congress, following a submission of the Secretary's report and findings to the President and the Congress. Reclamation Project Act of August 4, 1939, ch. 418, § 9 (a), 53 Stat. 1193, 43 U.S.C. 485h (a).

ly include a substantial number of special rules and conditions which become the law of the project for that particular enterprise."

[32] A number of such authorization acts are printed in 43 U.S.C. beginning at § 614. See also Bureau of Reclamation, Dept. of Interior, *Project Feasibilities and Authorizations* (Govt. Print. Office 1957).

It is particularly important to note that the congressionally mandated procedures provide ample opportunity for the affected states and state agencies to submit their comments, criticisms, suggestions, plans and recommendations to Congress. *See particularly* the Flood Control Act of 1944, 58 Stat. 887, 33 U.S.C. § 701-1, the Fish and Wildlife Coordination Act of 1958, 72 Stat. 564, 16 U.S.C. § 662,[33] and the Water Project Recreation Act of 1965, 79 Stat. 213, 16 U.S.C. §§ 460*l*-12 to 460*l*-21. These procedures would be totally superfluous if the states were authorized to impose unilateral conditions on their permits. They evidence Congress' intention that there is to be close coordination and cooperation with the states in the development of water resource projects and that the Congress is to resolve conflicts between federal and state plans. They refute the totally unsupported allegations of California and the *amici* states that affirmance of the lower courts' decisions would leave the states with no voice in water development and allocation matters.[34] And they provide a comprehensive federal program for taking into consideration every conceivable aspect of water resources planning including flood control, fish,

[33] *See* Udall v. Federal Power Commission, 387 U.S. 428 (1967).

[34] To those familiar with the politics of water allocation in the West, the states' complaints and fears are almost laughable. *See* Hundley, Water and the West (1975).

wildlife, recreation and allocation matters. As stated by Sax, "As a political fact, then, the law presses the Secretary to be responsive to state desires."[35]

Professor Sax goes on to describe in more detail the content of the various feasibility and engineering reports that are submitted to Congess.[36] He also outlines the procedures and requirements set forth in the Water Project Recreation Act of 1965, *supra*,[32] the Fish and Wildlife Coordination Act, *supra*,[37] the Water Supply Act of 1958, 72 Stat. 319, 43 U.S.C. § 390b,[38] and the water Resources Planning Act of 1965,

[35] Sax, *supra*, note 15 at p. 283.

[36] Sax *supra* note 15, pp. 141-147.

[37] *Id.* at pp. 147-157. Sax states (at pp. 147-148):

> The Water Project Recreation Act of 1965, although complex and intricate in detail, is built upon a quite simple premise: Facilities for recreation and fish and wildlife enhancement should be an integral part of federal water projects, but the construction of such facilities should be made dependent upon acceptance by local public agencies of responsibility for administration and for partial cost sharing.

[38] *Id.* at pp. 151-153. Concerning the Fish and Wildlife Coordination Act, Sax states (at p. 151):

> It provides that whenever waters are to be impounded, diverted, or otherwise controlled by a federal agency or permittee there must be consultation with the affected state officials, that their views must be made an integral part of any report submitted to the Congress, along with a benefit-cost analysis, that such reports shall be fully considered, and that project plans "shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum over-all project benefits."

[39] *Id.* at pp. 290-291. Sax summarizes the essentials of that Act as follows (at p. 290):

> The Water Supply Act provides that in planning Army and Reclamation dams there may be taken into account present and future needs for municipal and industrial water. Up to 30% of the total estimated cost of any project may be allocated to

79 Stat. 244, 42 U.S.C. §§ 1962 et seq."

Superimposed on all of this is the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 et seq., particularly 42 U.S.C. §§ 4331-4334." NEPA " requires all agencies of the United States "to the fullest extent possible" to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement that analyzes the consequences of, and alternatives to, the proposed action. The impact statement must also consider "any adverse environmental effects which cannot be avoided should the proposal be implemented." Most importantly for our purposes, NEPA mandates cooperative federal, state and local efforts.

> Prior to making any detailed statement, the responsible Federal official shall consult with and

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anticipated future demands if state or local interests give reasonable assurances that there will be a need for the facilities and that they will be paid for not more than fifty years after they are first used.

[80] *Id.* at pp. 283-284. Sax has this to say about the 1965 legislation (at p. 283):

> The most ambitious effort yet undertaken to foster co-operation between state and federal agencies, as well as among the various federal departments, was the enactment of the Water Resources Planning Act of 1965. It not only promotes the *idea* of working together; it provides operative means for the development of the joint and co-ordinated plans of local, regional, and national planning authorities.

[80] NEPA had not been enacted when Sax' chapter on Federal Reclamation Law was written in 1967.

[81] 42 U.S.C. § 4332(2)(3).

> obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes . . . .

Thus as applied to proposed undertakings under the reclamation program, NEPA's force is felt on at least two levels. First, since proposed reclamation projects must seek both congressional authorization and the appropriation of funds for its construction, the NEPA statement serves the function of making the Congress aware of the proposal, its environmental consequences, alternatives and possible mitigation measures as well as the views of all interested and affected federal, state and local agencies. Congress can then if it chooses legislate the resolution of inter-governmental conflicts. Second, the NEPA statement tells the responsible federal officials of the available alternatives and the views of other federal agencies and affected states, local governments and concerned citizens and groups. The federal decision maker will then be in a position to exercise informed judgment within the limits of his statutory powers.

The decisions of the lower court must be affirmed in order to effectuate NEPA. If critical water allocation decisions become the province of state administrative agencies, the NEPA process cannot function in the manner intended by Congress. Instead of federal of-

ficials being presented with the views and comments of appropriate state and local agencies to be considered in federal decision making, the federal government will be told how the project will be operated. The ambit of federal discretionary action will be drastically narrowed if not altogether eliminated. That result is well illustrated by this very controversy, *Environmental Defense Fund* v. *Armstrong,* 487 F.2d 814 (9th Cir. 1973), *cert. denied,* 416 U.S. 974, and is contrary to NEPA's express mandate:

> Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter.

42 U.S.C. § 4332."

Finally, one other recent and important federal statute bears on the fundamental jurisdictional conflict raised by this case, the Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq. Section 1536 provides:

> The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authori-

[33] In this particular controversy both sides can claim to be on the side of the environment. Environmental Defense Fund v. Armstrong, *supra,* 487 F.2d at 820. Less "clean" hydroelectric power probably means more nuclear or fossil fuel burning plants. Other states may not be as sympathetic to fish, wildlife and recreation concerns as California. *See* p. 2, *supra* and note 33, *infra.* Our concern has to do with the integrity and viability of the NEPA procedures. We do not purport to assess the environmental pedigree of the western states vis-a-vis the federal government which, in any event, changes from time to time.

> ties in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

Again, the states' role is advisory. Primary authority is vested in the Secretary of the Interior and other federal officials. Subjecting federal water resource projects to the conditioning authority of state administrative agencies is inconsistent with this recent federal statutory scheme.

All of this legislation, including the basic Reclamation Act as amended, is predicated on federal-state cooperative efforts. But "if there is to be a joint, comprehensive, and co-ordinated program, legal mastery of it must come to rest somewhere." [34] Under the Constitution the only logical and permitted place is the federal government.[35] As we have seen, in some of its legislation Congress has established itself as the forum for resolving conflicts.[36] That itself is incompatible with

[33] Nevada's attitude toward endangered species is exemplified by the actions of its officials described in Cappaert v. United States, 426 U.S. 128 (1976).

[34] Sax, *supra* note 15 at p. 284. *See* Arizona v. California, 373 U.S. at 589 and 590 quoted *supra* at p. 7.

[35] Hancock v. Train, 426 U.S. 167, 178-179 (1976); Arizona v. California, 283 U.S. 423 (1931).

[36] *See* pp. 14-20, *supra.*

the conferral of mandatory conditioning authority on state administrative agencies. Any remaining doubt, here as in *Arizona* v. *California,* 373 U.S. 546, 575-590 (1963), is laid to rest by the Secretary's delegated power to negotiate and execute water supply and repayment contracts.

California and the *amici* states seek to distinguish *Arizona* v. *California* on the grounds that it involved a contest between a specific federal law and conflicting state laws and that under such circumstances the federal law is obviously supreme.[37] But the provision of the Boulder Canyon Project Act on which the decision rested, Section 5, 43 U.S.C. § 617d, simply authorizes the Secretary to contract for the storage and delivery of stored water and for reimbursement of operation, maintenance and construction costs. It also prohibits anyone from using any of the stored water without a contract except as otherwise provided in the Act.[38] The general reclamation laws applicable to New Melones as well as all other projects confer the same contractual authority on the Secretary.

As we have noted, under the 1902 Reclamation Act all projects were to be operated by the federal government. Section 6. Pursuant to Section 4 of that Act the Secretary of the Interior arranged with each water user for repayment of construction on an individual basis. In 1914, the Secretary was authorized, "in his discretion" and "under such rules and regulations as he may prescribe" to designate water users' organiza-

[37] California's Brief at pp. 52-53 n.40; *Amici* Brief of Arizona et al., pp. 14-15.

[38] The exception relates to "present perfected rights" which are accorded preference under Section 6 of the Act, 43 U.S.C. § 617e.

tions as fiscal agents to collect repayment money. The Secretary was also authorized to transfer to such organizations responsibility for care, operation and maintenance of all or any part of the project works, "subject to such rules and regulations as he may prescribe." 38 Stat. 687-688, 43 U.S.C. §§ 477 and 499. By 1922, the Secretary was enabled to contract directly with the users' organization, which could bear the repayment obligation in place of the individual users. 42 Stat. 541, 43 U.S.C. § 511. In 1924, Congress required certain projects "to take over, through a legally organized water users' association or irrigation district, the care, operation and maintenance of all or any part of the project works, subject to such rules and regulations as the Secretary may prescribe, and thereafter the United States, in its relation to said project, shall deal with a water users association or irrigation district." 43 Stat. 702, 43 U.S.C. § 500. Then in 1926 water supply and repayment contracts were made mandatory. Section 46 of the Act of May 25, 1926, 44 Stat. 649, 43 U.S.C. § 423e provides:

> No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States.

The 1939 amendments to the Reclamation Act include similar provisions. 53 Stat. 1193, 43 U.S.C. §§ 485h(d)

and 485h(e)." All of the foregoing laws apply to the New Melones Project. 76 Stat. 1191.

Consequently, what we have here is a precise analogue to the Boulder Canyon Project Act construed in *Arizona* v. *California*, 373 U.S. 546 (1963), where the Supreme Court placed principal reliance on the Secretary's contracting authority in holding that state water laws could not be applied. The Court stated:

> The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it.

373 U.S. at 580.[40] Here, as in *Arizona* v. *California*, "where the Secretary's contracts carry out a congressional plan for the complete distribution of waters to users, state law has no place." 373 U.S. at 588. "Unitary management," 373 U.S. at 589, is required.

The conditions imposed by Decision 1422 drastically interfere with the Secretary's contractual authority. Most significantly, they severely limit the amount of hydroelectric power than can be generated at New Melones. *See Environmental Defense Fund* v. *Armstrong, supra*, 487 F.2d at 820-821.[41] That in turn ad-

[39] *See also* 43 U.S.C. § 485e which again expressly delegates broad discretionary authority to the Secretary to negotiate the terms and conditions of the repayment and water supply contracts.

[40] The Court noted that Congress had imposed some limits, that the Secretary is responsible to the President and Congress and that his actions are subject to judicial review. 373 U.S. at 584-585.

[41] For example, Decision 1422 would prohibit the Secretary from entering into a contract with a water users' association that requires maximum utilization of the project's power generating capability.

versely affects the project's ability to repay the cost of construction, a matter of intense if not overriding concern to the United States." It is difficult even to conceive of any important condition on a water permit that would not detract from the Secretary's broad discretionary powers to negotiate the terms and conditions of water supply and reimbursement contracts.

III. The Distribution of Federal-State Authority Proposed By the Western States Is Unworkable

California and her supporting *amici* states recognize, as they must, that the three decisions of this Court interpreting and applying Section 8 and its counterpart in the Boulder Canyon Project Act[42] establish, at a minimum, that federal laws and policies preempt state law when there is a direct conflict between the two. They argue however that the states should be allowed to apply their laws "where Congress has not spoken" or where "the project's purposes are not otherwise impaired."[43] This system will not work unless the Secretary of the Interior has the ultimate authority to accept or reject the state's proposals. As

[42] *See* Sax, *supra* note 15 at pp. 257-258 and 273-274.

[43] Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); City of Fresno v. California, 372 U.S. 627 (1963); and Arizona v. California, 373 U.S. 546 (1963). The district court's opinion, 403 F.Supp. at 892, Appendix to the Brief for the United States In Opposition to Certiorari at p. 41a, does not give sufficient weight to the City of Fresno v. California decision. That case stands for more than that Section 8 defines the property interests, if any, for which compensation must be paid. It also holds that notwithstanding Section 8 the provision of the reclamation laws according a preference to irrigation over domestic uses overrides a California statute granting priority to domestic uses.

[44] California's Brief, p. 59; Brief of Arizona et al., p. 17.

previously stated, legal mastery must rest somewhere. The alternative is confusion, chaos and endless litigation.

Under the system proposed by the states, all competing user groups, which will often cross state lines, will petition and lobby the states' political and administrative officials for favorable conditions in their permits. If the Secretary favors or adopts an operating plan or other regulations that do not permit compliance with the state's conditions, litigation will ensue. The issue will be whether the state's conditions are consistent with federal laws and policies.

As we have seen in Part II of this Brief, when Congress authorizes and appropriates funds for a reclamation project, it is presented with volumes of materials relating to every conceivable aspect of the project, cost data, engineering feasibility, water supply, crop data, repayment capability and prospects, economic impacts, affects on fish, wildlife, endangered species and their habitat, air pollution and water quality, population growth, recreation, etc. Some of the reports are published as House or Senate Documents.[45] Sometimes, as in the case of New Melones, the authorizing legislation expressly refers to the document that contains some of the reports.[46] Some of the documents, like environ-

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[45] *See* p. 16, *supra*.

[46] As an example the New Melones legislation states:

> The new Melones project, Stanislaus River, California, authorized by the Flood Control Act approved December 22, 1944 (58 Stat. 887), is hereby modified substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 453, Eighty-seventh Congress, at an estimated cost of $113,717,000. . . ."

76 Stat. 1191.

mental impact statements, may include administrative decisions regarding how the project will be operated; others may simply list the alternatives and their likely impacts with or without recommendations or rankings. In these circumstances, deciphering what is or is not included in the law or policy of the project is virtually impossible." It is, at the very least, a monumental undertaking.

The states' proposal invites conflict. When a water user does not like something that the Secretary has done, he will petition the state administrative agency to impose a condition that is more to his liking. For example, the Secretary has adopted regulations applicable to the Newlands Project in Nevada that are designed to reduce its Truckee River diversions and thereby increase the inflow to Pyramid Lake. 43 C.F.R. § 418; 38 F.R. 6697 (1973). Those regulations prohibit what one court has described as the "highly wasteful" practice of diverting water for single purpose hydroelectric generation during the winter months.[48] They also require the water users' association to adopt other measures for conserving precious water supplies such

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[47] This case provides an apt illustration with the United States maintaining that California's conditions are inconsistent with the project and California contending that there is no incompatibility at all. The district court expressly refused to rule on that aspect of the controversy. 403 F.Supp. at 901, Appendix to the Brief for the United States In Opposition to Certiorari at p. 63a. Given Congress' traditional and legally mandated concern about the repayment capability of reclamation projects, it seems difficult to conclude that a condition that substantially reduces power revenues is consistent with Congress' overall plan. See the text accompanying footnotes 41 and 42, *supra*.

[48] Burley Irrigation District v. Ickes, 116 F.2d 529, 535 (D.C. Cir. 1941), *cert. denied*, 312 U.S. 687.

as installation of measuring devices, charging for water by the acre foot instead of by the acreage irrigated, etc."[49] Adopting the position of the states in this litigation would invite state administrative agencies to attempt to modify or effectively repeal these Secretarial regulations.[50] Whether they survive would then depend upon the outcome of lengthy and complex federal litigation in which the court attempts to fathom the mysterious, indeed in this case non-existent, intent of Congress.[51]

The decisions of this Court have consistently recognized that federal water resource undertakings cannot be made subject to state laws or state vetoes or mandatory state conditions. *Arizona* v. *California*, 373 U.S. 546 (1963); *City of Fresno* v. *California*, 372 U.S. 627 (1963); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958); *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955); *First Iowa Hydroelectric Corp.* v. *Federal Power Commission*, 328 U.S. 152 (1946); and *Arizona* v. *California*, 283 U.S. 423 (1931). *Cf. Hancock* v. *Train*, 426 U.S. 167 (1976); and *Environmental Protection Agency* v. *California*, 426 U.S.

[49] *See* Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (D.C.Cir. 1973).

[50] The State of Nevada might determine that single purpose hydro generation is more important and a higher beneficial use than protecting the habitat of rare, threatened or endangered species.

[51] The Newlands Project was one of the very first authorized by the Secretary of the Interior in 1902. There was no congressional attention specifically focused on this project. *See* p. *supra*.

200 (1976)."[52] Congress has just as consistently legislated an important advisory role for state and local agencies in planning and complementing federal water policies and projects. That legislation presupposes federal supremacy. The system has worked well. Certainly no one has accused the Bureau of Reclamation of being insensitive to state and local concerns. No change is warranted, particularly one which would interpose the federal courts as the ultimate arbiters.

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[52] State and local agencies always have the option of proposing to federal officials that certain conditions or regulations be adopted. *See* Pacific Power & Light Co. v. Federal Power Commission, 333 F.2d 689 (9th Cir. 1964). If the federal officials do not agree, states have the ability to go to Congress during authorization or appropriation hearings.